The Compleat LAWYER. OR A TREATISE Concerning {TENURES AND ESTATES} In Lands of Inheritance for Life, and for Yeares: Of Chattels Reall and Personall, and how any of them may be conveyed in a Legall Forme, by Fine, Recovery, Deed, or Word, as the Case shall require.

Per GULIEL. NOY, *Armigerum, nuper Attournatum Generalem* CAROLI *Regis* [redacted].

LONDON,
Printed for *G. Bedell* and Partners, and are to be sold at their Shop, at the *Middle-Temple-gate, in Fleet-street*,
1651.

LAWYER

OR A

TREATISE

Concerning { TENURES AND ESTATES

In Lands of Inheritance for Life, and for Years: Of Chattels Real and Personall, and how any of them may be conveyed in Law from Time to Time, by Fine, Recovery, Deed, or Will, as the Case shall require.

May 5, 1916

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1656.

The Compleat Lawyer.

OR,

A Treatise concerning Tenures and Estates in Lands of Inheritance for Life, &c.

Question.

HOw were the multitudes of people at the first divided?

Answer.

Into Families, Common-wealthes, and Kingdomes.

Q. *To what end?*

A. To live godly, peaceably, and quietly together.

Q. *How is that performed?*

A. By keeping the Law of God, which we call Religion, and by executing vertue,

and punishing vice, by which vertue and good manners doe spring.

Q. *What doth best uphold and maintaine these things?*

A. The Law.

Q. *How manifold is that?*

A. Twofold, *viz.* The Law of Nature, and the Law written.

Q. *What is the Law written?*

A. It is either Divine or Civill.

Q. *What doth the Civill Law worke?*

A. A defence and encouragement to the good, and a bridling and punishment to the evill.

Q. *What else doth it worke?*

A. A security to the life of man, and quiet enjoying of *Meum* and *Tuum*.

Q. *How came in Meum and Tuum?*

A. By the Law of *Jus gentium*, [illegible] right and property to Lands, Tenements, goods and Chattells, are belonging to men.

Q. *How doth every Subject in England claime and hold his lands and goods.*

A. By Estates in Law.

Q. *How many Estates in Law are there in Lands and Tenements.*

A. Three, viz. Estates of Inheritance, Francktenement, and Chattells realls.

Q. *How are Estates of Inheritance divided?*

A. Into

A. Into Fee Simples, and Fee Tayle.

Q. *How are Fee Simples divided?*

A. Into Fee Simples absolute, and Fee Simple Conditionall.

Q. *What is an absolute Fee Simple?*

A. When lands are given to me, and to my heires for ever.

Q. *What is a Fee Simple Conditionall?*

A. When Lands are given to me and to my heires for ever, upon Condition I doe such or such a thing, &c.

Q. *How are Estates Tayle divided?*

A. Into tayles generall and speciall, and into Tenant in tayle after possibilitie of issue extinct.

Q. *What is an an intayle generell?*

A. When lands or tenements are given to *I S.* And to the heires of his body lawfully begotten or to be begotten.

Q. *What is an intaile speciall?*

A. When lands or tenements are given to a man, and to his wife, and to the heires of their two bodyes between them lawfully begotten.

Q. *How is tenant in tayle after possibilitie of issue extinct?*

A. When lands are given to a man and his wife, and to the heires of their two bodyes between them lawfully begotten,

if the man or wife die without iſſue betweene them, the Survivor is Tenant in tayle after poſſibility &c.

Q. *Is ſuch a Tenant puniſhable of waſt or noe?*

A. Noe, hee is not puniſhable of waſt, yet hee may forfeit his Eſtate by granting a greater Eſtate to another then he hath himſelfe.

Q. *May other Tenants intayle forfeit their Eſtates?*

A. Noe, unleſſe they commit Treaſon.

Q. *How is Franck tenement divided?*

A. Into foure parts, viz. tenant by Curteſie, tenant in Dower, tenant for his owne life, and tenant for another mans life.

Q. *How are chattells divided?*

A. Into reall and perſonall.

Q. *What is a chattell reall?*

A. A terme for yeares, the ward of lands, and tenant at will.

Q. *What are Chattells perſonall?*

A. All manner of Goods, Corne, Cattell, Houſholdſtuffe, and vtenſills whatſoeves.

Q. *How doth a Fee ſimple in lands or Tenments paſſe from one to another?*

A. It may paſſe by a Fine, or by Deed, rayſing of a vſe upon valuable conſider-

tion

tions, or by deede with Livery of seisin, or or by a will in writing *sealed* since the Statute of Wills, or by a Deed without livery, inrolled within sixe Moneths after the date therof by the Statute in the 34 yeare of H.8 and by a Reversion in fee by Attornement. But of things incorporate, there can be no Actuall livery, but they passe by grant in writing onely, or by lineall discent.

Q. May Tennant in fee Simple convey his lands and tenements from his wife and heire?

A. Yey that he may, to whom and by what Estate hee will, except it bee in *mortmaine, contra statutum* in the seventh of *Edward* the first, and excepting such right & Dower as his wife hath in the said lands.

Q. May he charge these lands?

A. Yes, either by a yearly Rent with Clause of distresse, which is called a Rent-charge, or by an Annuity, or by statute, and also if he dye, these lands shall bee affetts to pay his debts.

Q. Is there no forfeiture of these lands?

A. None, except hee commit felony or treason.

Q. May they any way escheate?

A. Yes, if the tenant die without heire generall or speciall, then the Lord of whom they are holden shall have the same by escheate.

Q. *What is the law sithence the statute in such cases?*

A. If at this day there bee Lord and Tenant in fee Simple by Chivalrie and twenty pence rent, if the Tenant enfeoffe an Estranger of the said land, the Estranger shall hold of the Lord by the said services and rents as the Tenant did hold, and the Feoffer or seller, shall bee excluded, and be not meant at all.

Q. *What if the said Tenant maketh a Feoffement of the said land to another without expressing to whose use?*

A. Then it shall bee to the use of the Feoffer and his heires, except a valuable consideration bee given for the land, then it shall bee to the use of the Feoffees.

Q. *What if the Tenant sithence that statute doth enfeoffe a stranger of part of the land?*

A. Then the stranger shall hold of the Lord *per particulas Morum*, viz. the Rent shall be apportionated.

As if there be twentie Acres of land, and twenty shillings Rent, the Purchasor shall hold by three shillings Rent for three Acres.

But if there be an entire service, that cannot be apportionated, as a horse, a hawke &c. The Lord shall have the whole.

Q. *What if the purchase be of the moyetie of of the whole land?*

A. There shall bee noe apportionallment of the Rent &c.

Q. *What if the Lord sithence that statute purchase parcell of the tenencie?*

A. By that purchase all the entire annuall services be extinct, except it be for the profit of the Comonwealth, then it remaineth, otherwise it is extinct. For that purchase read *Bruertons* case in the sixe part *de lo: Cooke.*

Q. *What if the Lord purchase parcell of the land where the Rents and services are apportionated.*

A. Then the rents and services shall be apportionated.

Q. *Put a Case thereof?*

A. If there be Lord and Tenant of six Acres of land by six pence rent, and suite of Court, if the Lord purchase two Acres, the Rent shall bee apportionated; but otherwise if the rent and services be entire, as suit of Court, homage &c. Extinct.

Q. *VVhat if these entire services come to the Lord of part of the land by the meere Act of God, or of the law?*

A. Then the intire services shall remaine to the Lord.

Q. *Put a Case of that?*

A. If there bee Lord and Tenant of foure Acres of land, by a Hawke, homage, suit of Court, and herriot, in this case, if one of these Acres discend to the Lord, the whole services remaine.

But if the Lord had purchased the said Acre, or released to the Tenant the services of the said Acre, all the services alwaies are extinct.

Also in this case, if the Tenant doth enfeoffe any Estranger of one of those Acres, the Feoffee shall hold the whole services.

But otherwise if the services may bee apportionated, as of Rent, Common, or Perper, &c. And thereupon are great diversities betweene Rent-service and Rent charge

Q. *What apportionallment is there of Rent-Charge?*

A. Rent Charge is nowat this day as Rent service was before the statute. That if the partie that hath the Rent, purchase any part of the land charged, the whole Rent is extinct.

Q. *May a tenure be reserved upon a gift in tayle sithence the said statute?*

A. Yes, looke how a Tenure may be created and reserved upon lands and tenements in

in fee Simple before the ſtatute, ſo it may be of lands given in the tayle ſithence the ſaid ſtatute.

Q. *What if the Donor reſerveth noe ſervice upon the guift in tayle?*

A. Then the Donee ſhall hold by ſuch ſervices as the Donor holdeth over.

Q. *How is this to bee underſtood?*

A. Where the Reverſion in fee Simple remaineth in the Donor.

Q. *What if the Reverſion be granted over?*

A. Then the Grantee thereof ſhall hold his Reverſion of the chiefe Lord.

Q. *Is the King tyed by the ſtatute of* Quia emptores terrarum?

A. Noe, the King is not Subject to that ſtatute.

Q. *Upon what things may a tenure bee reſerved?*

A. Properly upon a Feoffement, or gift in tayle, in lands or Tenements, and of Corporate things, into which may be an Entrie or manuall occupation.

Q. *Of what things may noe tenure bee reſerved?*

A. Vpon incorporate things, as Courts, Rents, Wayes, Piſcaries and ſuch like.

Q. *Of what things in nature muſt the tenure bee?*

A. Of

A. Of things which are either profitable to the Feoffer or Donor, or to the commonwealth.

Q. *May the service upon the tenure be reserved to be done by an estranger?*

A. They cannot properly be so reserved.

Q. *Can the Tenant hold his land by two tenures?*

A. Noe, one parcell of land cannot bee holden by severall tenures.

Q. *What tenure and service may be reserved upon an Estate of franktenement?*

A. Commonly upon an Estate of franktenement nothing is reserved but Rent, and to that Rent fealtie is incident by proper Right.

Q. *What is Franktenement?*

A. In estate for ones life, or for another mans life.

Q. *How doth it passe?*

A. Either by writing, or by parroll, and upon the same generally there must be a livery of seisin.

Q. *How many maner of Estates for life are there.*

A. There are foure, Tennant for his owne life, for another Mans life, Tenant in Dower, and by Courtesie.

Q. *Have these like power as the other Tenants have.* *A.* Noe,

A. Noe, the ſaid Tenants for life, and tenants for yeares, may not grant a greater eſtate to another of the ſaid lands, then he hath himſelfe; nor may not commit waſt, nor change, nor incumber the ſaid lands, longer then they have eſtate therein.

Q. What doe you call waſt.

A. Waſt is properly any thing that is done, or committed in the ſaid land to the diſinheriting of the deſſor, or of him in the reverſion.

Q. Who ſhall puniſh waſt or forfayture.

A. He that is next in reverſion or remainder in the ſaid land of an Eſtate of inheritance.

Q. By what law.

A. Tenant in Dower and Tenant by the Curteſie, before the ſtatute of Glouceſter, and the reſt by the Eſtatutes.

Q. What call you a Reverſion or Remainder?

A. The eſtate that dependeth, and is to come in poſſeſſion after theſe particular Eſtates ended.

Q. How doth a Reverſion paſſe, ſithence there can be no livery of ſeiſin without licence of the Terre tenant?

A. It doth paſſe properly by deed in writing, and Attornment of the particular

ticular Tenant, or by fine, &c.

Q. *How doth a Remainder passe?*

A. Alwaies it beginneth with the particular Estate, and dependeth upon the same, otherwise it is commonly not good; unlesse it be by devise, or will, and it must begin when the particular Estate endeth; or or else it is naught.

Q. *Put me a case upon that point?*

A. If a lease be made to *I. S.* of Certaine lands for life, the Remainder thereof to the right heires of *I. N.* this is a contingent Remainder, for if *I. S.* dye in the life of *I. N*: the Reversion thereof is void, otherwise if *I.N.* dye in the life of *I S*: and hath an heire, then the remainder is good.

Q. *What difference is there between a Reversion and remainder?*

A. Great difference, The Reversion is the remnant of the Estate, that the Donor or leasor reserveth in himselfe, and passeth not with the particular Estate.

But the Remainder alwaies passeth with the particular Estate at the first Creation thereof, but being created, may passe as a Reversion without the particular Estate. Also he that cometh to lands by Remainder, cometh in as a Purchasor, and shall not bee in ward, but the other in reversion may be in ward.

Q. *What*

Q. What other Estates are there mainteined.

A. There is Tenant by the statute Marchant of the staple, Tenant by Elegit, Tenant for yeares, Tenant at will, and Tenant by Sufferance.

Q. Doth an action of wast lye against these Tenants.

A. Noe, but onely against tenant for yeares, and he is subiect unto the like law, as tenant for life is.

Q. May an estate of Remainder depend upon an Estate for yeares?

A. Yes, very well, and then if the Remainder be for one life or more, there must be livery of seisin made to the tenant for yeares at his first entrie.

Q. If Tenant for yeares dye, who shall have his terme.

A. If he doe not grant it in his life, nor devise it by his will, his Executors or administrators shall have the same.

Q. How may it passe.

A. Either by writing, or by paroll, and it shall be assetts to pay the owners debts if he dye possessed thereof.

Q. What doe you call assetts?

There is assetts inmaines which is goods and Chattells of the Decedent, and there is

aſſets per diſcent, which is land in fee Simple, and both theſe ſhall be liable to pay debts ſo farr as they will goe.

Q. What doe you meane by deviſe or will?

A. When lands, goods, and Chattells, are deviſed or given by the laſt will and teſtament of any.

Q. May lands be ſo given without licence?

A. Yes they may, ſithence the Statute of wills. 32. H. 8.

Q. How was the Law before that Statute?

No man before that Statute could give Lands or Tenements by his Will in writing, to make an Eſtate of franke tenement or upwards, unleſſe the ſame were in uſe, viz. in the hands of the Feoffees.

Q. How is the Law ſithence that Statute?

A. Sithence that Statute a man may deviſe all his lands in ſoccage, and two parts of his lands holden in Knights ſervice.

Q. Why may hee not deviſe the other third part?

A. Becauſe it ought to deſcend, that the lord be not defrauded of his Tenure, viz. Ward, Marriage, &c.

Q. How be Wills made?

A. Either in writing, or elſe without writing, and then it is a Nuncupative Will: but no Eſtate in Lands for life, or upwards

will

will passe by a Will Nuncupative, which is without writing.

Q. What generall learning is else of wills?

A. The last Will is alwaies of force, *Quia voluntas est ambulatoria & non consummatur usque ad mortem Testatoris*, and then the intent of the devisor shall be much taken therin, as far as the words will extend.

Q. What doe you meane by the words use?

A. I distinguish it thus, That before the Statute of 27. *H.* 8. one man might have the lands, and another the use of the same lands.

Q. What did invent those uses?

A. Two things, viz. feare and fraud; feare in the time of War and troubles, and fraud to defeate the lords of the fee and Creditors.

Q. How many manner of uses are there?

A. Two viz. In Esse, and to come in contingencie.

Q. How in Esse?

A. Either in possession, or reversion, or remainder.

Q. How in contingencie?

A. Uses which may come and after be in possession, reversion, or remainder, if they be not cut off or barred.

Q. What things are incident to those uses?

A. Con-

and Confidence in the persons enfeoffed and purity in estate.

Q. *Did they good or harme in Common Law?*

A. They did more harme then good, whereupon diverse Statutes were enacted, as 1°. R. 2. the 4. H. 4. 1°. H. 7. the 11. H. 7. and 1°. R. 3. were ordained to suppresse the mischiefes that vses brought in.

Q. *Were those mischiefes remedied by those Statutes?*

A. No, they were not, untill the Statute of 27. H. 8. by which statute uses were transferred into possession, so that now upon creating of an use, it is presently turned into possession, and the the Feoffees are but conduit pipes to leade the uses.

Q. *How was it before that statute?*

A. Before that statute, he that had the possession, viz. the Feoffes might sell the land from *Cestui que use*, and he had but his remedie in the Chancerie.

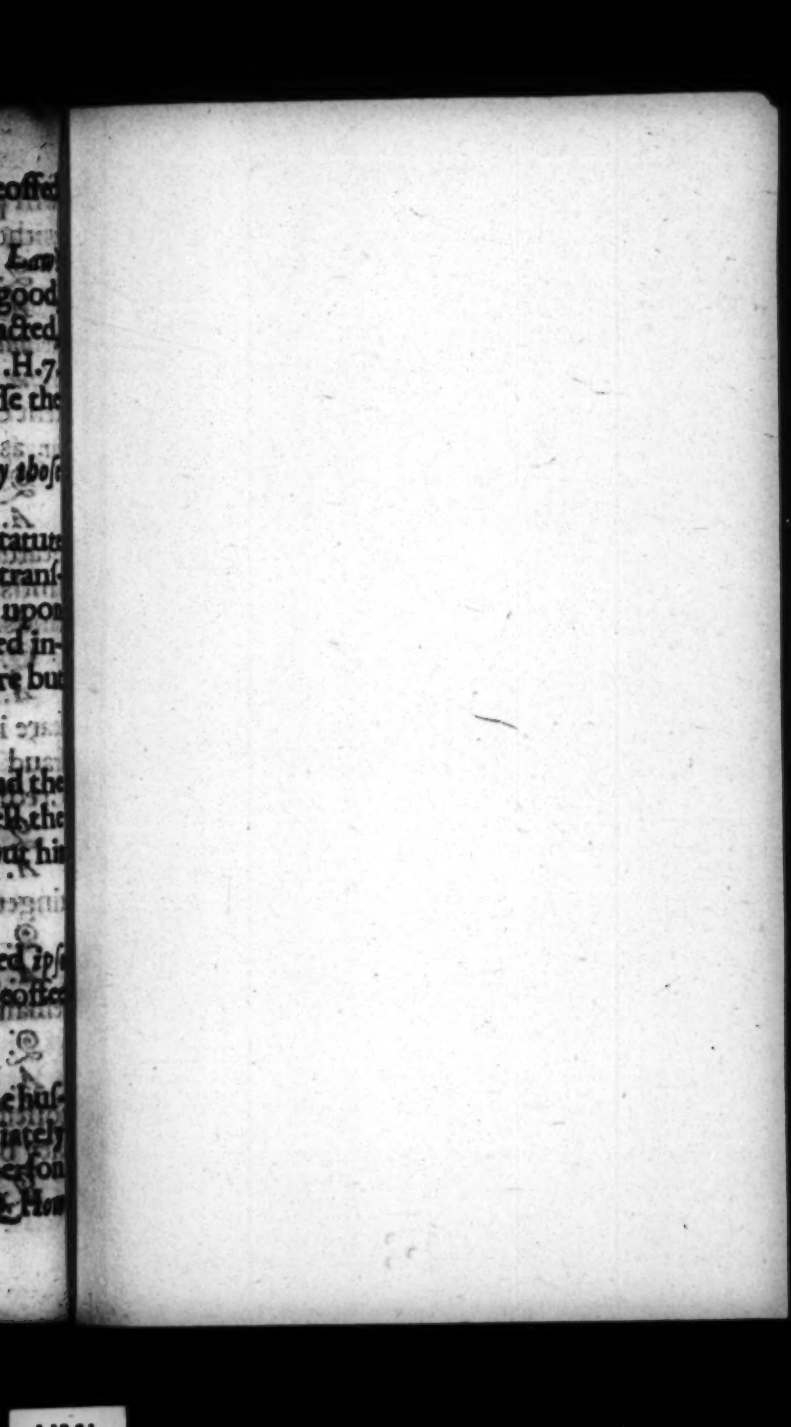
Q. *Are there any uses now in law.*

A. Yes, but they are transferred *ipso facto* into possession, & hereupon the Feoffee is excluded.

Q. *Why are they used.*

A. Properly to estate wives, for the husband cannot enfeoffe or grant Immediately to his wife, because they are but one person in the law.

Q. How



Q. *How must such an Estate be made?*

A. The husband must enfeoffe two or three to the use of his wife for life, or otherwise.

Q. *Why must he infeoffe two at the least?*

A. Otherwise one Feoffee hath such an estate thereby, that his wife cannot have her Dower.

Q. *May not the subject hold lands of the King?*

A. Yes, all the lands of England are holden either mediately or immediately from the King as Lord Paramount.

Q. *How may they bee holden of the King?*

A. By Knights service in Capite, by soccage in Capite, by Knights service won in Capite, by soccage won in Capite by grand serjeantie, and by pettie serjeantie.

Q. *What difference is there in these Tenures?*

A. Many great differences. All lands holden in Capite in Chivalry, doe draw ward, Marriage, and reliefe, viz. a Knights fee is fiue pound, and so ratably, and it causeth all other lands holden of the same Lords to be in ward. Also the tenant cannot grant these lands for life, or for any other higher estate without

license of the King, nor his wife cannot marry without license, and if they doe, they shall answer the King measne profitts. And if a Tenant enter, and sell without license, he must pay for his licence one yeares profit thereof. But to have a license before he enter, and sell, is but the third part of one yeares profit. Also the heire having been in ward, when when he cometh to full age, must sue livery, which will cost him one yeares profit. And if he be at full Age at the death of his Ancestor, then he must have a primer seisin, which is of like charge.

Q. What if it bee holden in soccage in Capite?

A. That draweth not ward &c. nor any other lands, and the Reliefe is one yeares rent, but the tenant must sue his livery or primer seisin of those lands onely.

Q. What of lands in Knights service onely?

A. That draweth onely ward, Marriage and reliefe, onely for that land, in case of a common person, but that the King must have his Prerogative without Priocitie or posteriorities.

Q. *What*

Q. *What doe you meane by prioritie?*

A. That if a common person holdeth ſeverall lands of two Lords by Knights ſervice, the eldeſt tenure, viz. he that made the firſt Feoffement, which is not ſo in the Kings caſe.

Q. *How may one otherwiſe hold of the King?*

A. He may hold by grand Serjeantie, and by pettie Serjeantie.

Q. *How doe they differ?*

A. Grand Serjeantie is Knights ſervice and more, for the reliefe thereof is the value of the land by yeare, and Pettie Serjeantie is ſoccage in nature.

Q. *Put a caſe thereof?*

A. He that holdeth of the King to find a man to ſerve in the warrs by forty daies at his own coſt, holdeth by grand ſerjeantie. But he that is to find a horſe, or ſuch a thing, to ſerve as aforeſaid, that is pettie ſerjeantie, becauſe it is not to be done by a mans body.

Alſo the tenant may hold of the King, or of a common perſon by Eſcuage, Homage, Anceſt. Or by homage, fealty and ſuit of Court.

Q. *What is the meaning thereof? And put a caſe thereof?*

A. Eſcuage

A. Escuage uncertaine is Knights service, and Escuage certaine is soccage. Homage Ancest is alwaies between the Feoffor and Feoffee and their heires; the other Homage is sometimes joyned to Knights service, and sometimes to soccage. And fealtie is alwaies incident to all manner of Tenures and Estates.

Q. *Of what nature are these services?*

A. Some of them are valuable, and some not.

Q. *Upon what cause were they reserved?*

A. To keepe a knowledge between the Lord and tenant in law and recompence of the land.

Q. *What remedy is there if the tenant doth not his service?*

A. The Lord may of common right distraine for them, and if the tenant die without heire generall or speciall, or be attainted, the Lord shall have the land by Escheate, as having noe tenant to doe his service. And thus much briefly of Estates, tenures, and service.

Q. *Why hath the Lord the ward of the the body and lands of the heire being not twenty one yeares of age?*

A. Because if the land be given to the tenant to doe service of Chivalrie, and

when

when the tenant dyeth, his heire being within age, for that such a tenant cannot doe the service, the Lord will have the body and land untill he come of age.

Q. When shall such an heire be said to be in ward?

A. When the Father dyeth seised of lands holden in Knights service and his heire being a sonne, and within the age of one and twenty yeares, and if it be a daughter within the Age of fourteen yeares, the Lord shall have the ward untill sixteen yeares by the statute law.

Q. Why if the Father die seised but of a Reversion of the said land, an estate for life or yeares then being on foot?

A. The heire shall be in ward for his body.

Q. Is it so if the Father die seised of a Remainder?

A. Noe, the heire there shall not be in ward, if the tenant for life be living.

Q. What other difference are there?

A. If lands holden in Knights service come to the heire by discent, hee shall be in ward, but if it come by purchase, he shall not be in ward.

Q. Put a case thereof?

A. If

A. If the Father and Sonne purchase lands, holden as aforesaid, to them, and to the heires of the Father, and the Father dyeth, the Sonne within age shall be said to bee in by purchase, and not by discent, and shall not bee in Ward But by the Statute in the 30th. of H. 8. If it be holden by the King, hee shall be in Ward.

Q. *When shall the heire be said to be out of ward?*

A. If it be a Male, when hee accomplisheth the age of twenty yeares; if it be a Female, she must be full fourteen yeares at the death of her Ancestor, otherwise the Lord will have her Ward untill she be sixteen by the Statute.

And also, if the heire being in Ward and within age, be made a Knight, then he shall be out of Ward: But otherwise if he be made a Knight in the life of his Father.

Q. *What is the Lord to have by his Tenant when he comes to full age?*

A. He is to have the value of his Marriage, if hee doth not take a wife during his Nonage, and the double value of his Marriage, if hee take a wife during his Nonage, and the double Value

of

of his Marriage, if hee take a wife during his Nonage, if the Lord tender him a wife without disparagement. But note that the first tender is not materiall.

Q. *How shall that value be tryed?*

A. By a Jury, sworn to try and value the same.

Q. *Shall he bee in Socage within age is in ward?*

A. Yes, untill hee come unto the age of fourteene yeares, and then the Guardian is to account unto him for the profits of the said lands, and after the age of fourteene yeares, hee is to take the profits of his lands by his *Praebont anie*. But the Guardian in Chivalry is not so to doe, but to have the Ward of Body and Land to his owne use untill the age aforesaid.

Q. *Who ought to have the wardship of the heire in Socage?*

A. If his Lands doe descend unto him by the fathers side, his next Uncle or friend on the Mothers side, to whom the Land may not descend; *Et sic è converso.*

Q. What is the reliefe of lands in Soc-cage?

Ans. The value of one year rent.

Q. *What if a man bee disseised his lands and tenements, or dispossessed of h goods and chattels, what remedy hath bee Law?*

A. His remedy is either to enter in the Lands and Tenements, if his En trie be congeable, as if there bee discontinuance nor discent cast; or el to bring his Action, and so to recov the same by course of the Law, upo every which Action there is a prop and speciall Writ ordained.

Q. *How many manner of Actions there?*

A. There bee Actions reall, an Actions personall, and Actions mixt.

Q. *VVhat doe you call Actio reall?*

A. Some are possessory, and some a ancester, the first being where the plai tiffe hath been seised, and is disseise and the other where the plaintiffe w never seised, but some of his Ancestor whose next heire he is.

Q. *VVh*

Q. *What shall the plaintiffe recover in reall Actions?*

A. In a reall Action the Plaintiffe shall recover the thing in demand.

Q. *For whom, and against whom do these Actions lye by Law?*

A. Alwaies by, or against Tenant for life.

Q. *Shall the Plaintiffe in these reall Actions alwaies recover Costs and Damages?*

A. In some of these Actions he shall, in some not.

Q. *How shall he know what Action doth lie properly for every demandant?*

A. That is great learning, and a long discourse.

Q. *Let me somewhat understand it in generall.*

A. First you must note that there are some Writs onely for Tenant in Fee Simple, as a Writ of Right, Tol, *Ayel, Befaiel, Cosenage, nuper obiit*, and such like as *Natura brevium* will shew you. Also, there are some Writs onely for Tenant in taile, and by the Donor, as *Formedon in* [illegible]

remainder, *discender*, & in *reverter*.

The first for Tenant or heire in taile, the second for him in the Remainder, when there is noe heire, and the intayled land ought to come unto him by his Remainder.

And for the Donor, when both the other doe faile, and for want of heire or remainder, the land ought to revert or come back to the Donor.

And some other writts doe lye for Tenant for life, against Tenant for terme of life, and the writt of *Novell Disseisin*, and all the writts of Entrie in degree as the case lyeth, viz. that the writt of Entrie *sur disseisin*, the writ of of Entrie in the *Per*, *Cui*, and *Post*, and in all these damages are to be recovered, and not commonly in the former.

Q. *How are these and the former to be tryed?*

A. The writt of Right being the highest writ in nature, lyeth where all the rest fayle, and is to be tryed by battle and grand Assise; and the issue is by joyning the mise upon the meere right, and the rest are to be tryed by verdict of twelve men, unto which the parties may have their due Challenge.

Q. *What*

Q. *What is the nature of actions personall?*

A. It is for the most part to recover Costs and damages for the thing in demand, and are to be tryed by verdict as aforelaid.

Q. *Recite some of these writs for actions personall?*

A. There are many, as a writ of trespasse, of debt, Accompt, Deceipt, Detynue, Covenant &c. *vide Natura brevium.*

Q. *How else doe the reall and personall actions differ?*

A. In reall actions, the land must be summoned and the view taken. But in personall Actions, the person of the Defendant must be summoned.

Q. *What are actions mixt?*

A. They are part in realtie, and part in personaltie.

Q. *Recite one thereof?*

A. There is the Action of wast, in which the place wasted, shall be recovered and treble damages.

Q. *How and by whom are these trialls to be executed in law?*

A. They are executed two wayes, either by Judges, which ought to be twelve, or by Iurors *lay men*, which ought to be twelve and Freeholders.

Q. When

Q. When by the Judges?

A. When the Councell in law of both sides doe demurre in law, that is, rested upon a meere point in law, that shall be tryed by Judges.

Q. When by a Iurie.

A. When the said Lawyers joyne upon an issue in fait which must be tryed *juxta probatum & allegatum, viz.* by evidence and witnesses.

Q. Where shall the tryall in fait be?

A. In that County where the Iurors may take best notice of the matter, *ubi semper debet fieri triatio ubi Iuratores Meliorem possunt habere notitiam.*

Q. How is that meant?

A. As when one is robbed in one Countie, and the goods are found in another Countie, or wounded in one Countie, and dyeth in another Countie, sometimes the Counties shall joyne together if they may.

Q. *You have reasonably satisfied mee in this matter, perceiving thereby that the law is the life and sinewes of every Common-wealth. But what doth your law consist of?*

A. It consisteth of a positive law, of Custome, and of Statute.

Q. What

Q. *What doe you call the positive law?*

A. That which was the first law, before Customes or statutes did alter the same.

Q. *Shew me some example of your positive law?*

A. There is a positive law in England, that a discent doth toll an Entrie, that between some Tenants the survivor shall have the whole, if noe act be made to the contrary, that the eldest sonne shall inherit, and all the daughters by equall portions. *Et sic de ceteris.*

Q. *What doe you call Custome?*

A. Custome may be in free land or in Copphold land.

Q. *How in the one and how in the other?*

A. By the Custome in certaine Burroughs which is called Burrough English, the yongest sonne shall inherit. And in Gavelkind all the sonnes, *& sic de ceteris.*

And in Copyhold land the words *sibi et suis* doe create an estate of inheritance, and the wife of a Copyholder that dyeth seised of his Copyhold lands shall have her free Bench during her widdowhood.

Q. *How are these customes maintained?*

A. The

A. The life of a Custome is use and continuance, so that it be not altogether against reason.

Q. *What doe you call your Statutes?*

A. Acts and Lawes, which are established by Act of Parliament, *by the King, the assent of the Lords Spirituall and Temporall, and the Commons of the Realme.*

Q. *To what end are they made?*

A. They are made generally either to abridge the power of the Common-Law, or else to enlarge the same.

Q. *Was the Common-Law defective before these Statutes?*

A. No, not altogether defective, but the Law hath been by great wisdome altered, or at least increased, or abridged, according to the offences of the Subjects growing and increasing from time to time.

Q. *Shew me some examples thereof?*

A. At the Common-Law, the counterfeiting of the great Seale of this Realme was Felony, and now by Statute it is Treason. So the cutting of a purse was but Trespasse, and afterwards the losing of his thumbe, and now Felony, and so of divers other things.

Q. Have

Q. *Have these Statute Laws amended or peired the Common Law?*

A. Where it hath not altered the positive Law, but hath onely increased or decreased the punishment thereof, it hath done great good, but where it hath altered the Common Law in substance, it hath done great harme.

Q. *Shew me an example where a Statute hath altered the Common Law?*

A. Amongst others, I will speak only of the Statute of *Westm.* the second, of *Entailes.*

Q. *Did that Statute good or harme?*

A. In my opinion much more harme then good to the Common-wealth and Subjects.

Q. *Shew me some of the conveniences, and inconveniences.*

A. The first cause of that Statute was to continue lands in the issue in taile, or in him in remainder *secundum voluntatem Donatoris*, which now may be cut off by fine and recovery.

Secondly, if the Father dye farre in debt, these lands will not bee liable to pay his debts, and thus sometimes the Creditor is undone, and many times defrauded.

Thirdly,

Thirdly, noe man can take any good Estate from the Tenant in Tayle contrary to the statute of 32. H. 8. But he must be at the charges of a fine and Recovery, whereby the estates of poore men are defeated.

Fourthly, if the Father commit felony, the sonne shall have the lands, which is an encouragement to evill.

All which as it standeth in my opinion, hath brought more harme then good, as Purchasors defeated, leases evicted, Estates and grants upon good considerations avoyded, Creditors defrauded, offendors emboldened, and divers other inconveniences.

Q. *I understand this, and the Law in the same sort in the rest. But how may estates in tayle be cut off* contra voluntatem Donatoris, *and I will trouble them no more?*

A. Alwaies the donee in tayle in possession, by a gift in tayle by his Ancestor, by a fine duly executed may cut off that intayle, and conclude partie and parties viz. those who are parties to the same fine, and their heires.

If it be with Remainder over to persons named in the deed, then there needeth a fine with Recovery to make it sure

ire, yet the fine is good as long as the
irſt Donee hath iſſue living, and doth
inde him in the remainder, if he maketh
ot his claime within five years after his
itle accrued.

But by a Recovery with a fine it is
arred preſently after the perfecting.

Q. *How muſt this fine and recovery bee*
ed out?

A. Firſt there muſt be a Recognition
f the Sellor, which is the Conizor by
Dedimus poteſtatem, or in the Common
leas before the Judges to the Buyer
lled the Cognizee, of the nature and
uantity of the land, and then finiſhed
ccordingly to make him Tenant of the
nd. Then take a *Præcipe quod reddat*, or
Writ of *Entrie* in the *Poſt*, muſt be
rought by two ſtrangers againſt the
id Tenant, and he muſt vouch the Co-
izor, *viz.* the Tenant in taile, and hee
uſt appeare by Atturney or in perſon,
d vouch the common voucher, and ſo
e Tenant to hold in quiet poſſeſſion,
d the Conizor, or tenant in taile to
cover over ſo much land, and this re-
very over (ſo purſued) is the reaſon of
Law, & called the double Recoverie.

Q. *What is the ſingle Recovery?*

 A. Such

A. Such a Præcipe or Writ of Entry in the *Post* muſt be brought againſt the Tenant in taile, and hee muſt vouch the common vouchee, which muſt appeare as aforeſaid, and confeſſe the warrantie.

Q. *Why is this not ſo good as the other?*

A. Becauſe it behoveth there the tenant in tayle to be ſeiſed of the ſtate taile at the time of the Recovery; for if he be ſeiſed of any other eſtate at the time of the Recovery; as if hee firſt diſcontinue the taile, and ſo bee ſeiſed of a Fee Simple at the time of the Recovery, then the Recovery is voyd.

Alſo a Collaterall warrantie from the Anceſtor of the Tenant in taile, which Anceſtor dying without iſſue, and the ſaid warrantie deſcending upon the ſaid iſſue in tayle, is a bar alſo of the tayle, if he maketh not his claime in the life of his ſaid Anceſtor.

Q. *If the Remainder aforeſaid be in the King, ſhall the King bee barred as aforeſaid?*

A. This was ſomewhat doubtfull before the Statute of 34 & 35 *Hen.* 8. But ſithence that Statute it is no diſconti-

nuance

nuance of the tayle, nor bar to the Tenant in tayle, nor to the King in Remainder; yet the Law maketh a difference at this day, if the King give lands in tayle, with the Remainder or Reverſion in the King, a Fine or Recovery will not bar that Entayle.

But if a common perſon give lands in tayle without a Reverſion or Remainder in the King, that entayle may be cut off by a Fine and Recovery. And ſo the difference is, when the gift is from the King, and when from a meane perſon. And thus much generally of entayled lands.

Q. *I pray you put me ſome more difference between the Prerogative and grant of the King, and of a meane perſon; and firſt touching his perſon?*

A. Firſt the Kings Majeſty hath two bodyes, *viz.* a Naturall and a Politique body.

Q. *Where, and when hath he a Politique body?*

A. For three cauſes, *viz. Cauſa Majeſtatis, neceſſitatis, & utilitatis.* In the firſt hee cannot give, nor ſell, nor grant but by matter of Record.

Secondly to avoid *inter-Regnum* an
Nonage, &c. That body cannot dye.

Thirdly, to take lands by diſcent, an
in that caſe the halfe blood cannot hun
Vide Cooke, Calvins caſe.

Q. *What is the meaning of all this?*

A. That the King or Queen of *Eng*
land in their politique bodies cannot b
diſabled, as by death, Nonage, Marriage
or any ſuch like, as a common perſo
may be.

Q. *What of his naturall body?*

A. He may have lands by diſcent an
purchaſe as a common perſon may do
by way of Remainder or matter of Re
cord.

Q. *What is his Prerogative in grant
made unto him, and in grants made by him*

A. It is a ground in Law, *quod nem
poteſt plus juris ad alium transferre quam
in ipſo eſt.* And further, nothing can
paſſe from the King, nor for the moſt
part to the King, but by matter of Re
cord, *viz.* by Letters Patents under the
great Seale, and that the King cannot
paſſe any thing by livery of ſeiſin, nor by
matter in fait, nor cannot diſſeiſe, nor
be diſſeiſed.

Alſo it is a Maxime in Law, *quod nul-*
lum

hun tempus occurrit Regi, that there ſhall be no Laches nor Eſtopples in the King for any right or title contrary to his expreſſe grant.

Q. *Then it ſeemeth that grants made from the King ſhall be taken ſtrictly?*

A. Yes, the King muſt not bee deceived in his grant, and the thing muſt bee named, and expreſſely ſet downe; for things not named will not paſſe by this word Appurtenances, and the grant ſhall not bee taken ſtrictly againſt the King, nor largeſt for the Grantee, as in a common perſons caſe.

Q. *What things in a common perſons caſe will paſſe by this word Appurtenances?*

A. An Advowſon appendant, common appendant, or appurtenant, and by reaſon of Vicinage, wayes, and ſuch like.

Q. *What things may paſſe by the grant of another thing, as incident thereunto?*

A. Many things may paſſe by the graut of another thing without ſpeciall naming of the ſame.

As a Rent by the grant of the Reverſion. By grant of a Mannor, the Hundred Court or Leete, and the ſervices. By grant of a Faire, the Court of Pypowder, and many things elſe in the ſame nature.

Q. *Which be things corporate and incorporate?*

A. Things Corporate are whereof there may be an Actuall possession, and entrie there unto, as of a Mannor, a house, lands, tenements, and such like.

Q. *Which be things incorporate?*

A. Things incorporate are rents, Courts, services, Common, and such like, and these may be appendent, appurtenant, or belonging to corporate things, as lands and such like.

Q. *What doe you call Common?*

A. It is the depasturing of one mans Cattle in the lands of another man, in which the commoner hath no estate, but it is according to the nature of the common claymed.

Q. *How many sorts of commons are there?*

A. Fower, Common appendent, appurtenant, | ingrosse, and by reason of vicinage.

Q. *How doe they differ?*

A. Many wayes, Common appendant and by reason of vicinage cannot be but by Prescription, time out of minde, but the other two may | begin at this day.

Also Common appendant belongeth properly

properly to arrable land, or to meadow, or paſture that was anciently arrable land, and it muſt be uſed with ſuch Cattle as are levant and couchant upon the ſame lands, viz. the ſame both in ſummer and winter, and with ſuch Cattle as may hide and gaine the lands, viz. eare and muck the ſaid lands, and not with hoggs, goates or geeſe.

But if the Commoner purchaſe any part of that land, or the tenant ſell any part thereof, the common ſhall be apportioned; But if the commoner buy all the ſaid lands by an equall eſtate, with the commoner, the common is drowned, and common appendent cannot be ſevered or granted from the land, otherwiſe of appurtenant. But if the Commoner appurtenant purchaſe any part of that land, the whole common is extinct, becauſe it is againſt common right, and common appurtenant may belong to any, and for all manner of Cattle *ſans nombre*, ſo as the uſage and clayme of either of theſe commons ſheweth and declareth what manner of common that is.

Common ingroſſe may be by grant or preſcription to have common in another

ther mans lands with twelve oxen, or twelve kine or leſſe, to a certaine number; and that may be granted over to another.

Common by reaſon of vicinage is when two Seignories or Lordſhipps, and the Tenants thereof have uſed time out of mind to common together in in their commons or feilds in the fallow or common time, by reaſon of their adjoyning; and want of incloſure, and this common is of the nature as common appendant, and the one Seignorie or Lordſhipp; may incloſe from the other, and drive or keepe the ones cattle out of the others Seignorie or Lordſhip; but the one may not not ſtaffe-drive their cattle into the others Seignorie or Towneſhip, and the one cannot have an action of treſpaſſe againſt the other, if the ones cattle wander or voluntarily goe and depaſture the others Seignorie or Lordſhip.

Quære if the one may incloſe part of their ſaid lands from the other, and leave part thereof for common; *vide Tyrinhams* caſe in *Cooke*. Alſo none of theſe commoners can have an action of Treſpaſſe againſt an eſtranger which

ſhall

ſhall doe treſpaſſe there, nor is to take his common otherwiſe then with the mouth of his cattle. *Quere* if the Commoner may trench the ground to looſe out the water that hurteth the ſaid land, Stat. 12 *H.*8.

Q. *Make me I pray you better to underſtand briefly what Tenant in Dower is?*

A. Dower is ſuch an Eſtate for the third foote during the wifes life, in all ſuch lands and tenements, as her husband was at any time ſeized of an eſtate of inheritance during the coverture.

Q. *Is the wife to have a third during her life of all ſuch lands and tenements?*

A. No, he muſt be ſole ſeized thereof, and not in joynt tenancy.

Secondly hee muſt have the Franckte-nement and the inheritance of the ſaid land in the ſaid Baronie, *ſimul & ſemel* during the Coverture.

And thirdly he muſt be ſeized of ſuch an Eſtate in the Coverture, that the child that hee ſhall beget of the ſaid wife, may by poſſibility inherit the ſaid lands.

Q. *Of what age ought ſuch a wife to be at the death of her husband?*

A. Of the age of nine years.

Q. *May*

Q. *May the husband by his act any way bar the wife of her Dower?*

A. Yes, in committing of Treason, but not of Felony, by the Statute in the first of E. 6. by laches, entry, suite, and pleading.

Q. *May tenants in Dower forfeit their Estates?*

A. Yes, diverse wayes, as other Tenants for life may, and also by elopment from her husband in his life without reconciliation.

Q. *May the wife of him that holdeth lands of the King in Capite be endowed by the heire or any other common person?*

A. No, she ought to come into the Coancery, and there make an oath, that she will not marry without the Kings license, whereupon a Writ shall bee directed to the Escheator to endow her.

Q. *May the wife have Dower, and also Joynture of her husbands lands?*

A. Noe, unlesse it bee in especiall cases.

Q. *When may the wife be at her Election?*

A. If the Joynture be made during the Coverture, then at the decease of her husband, she may chuse the one, or the other, but if it bee made before the Cover-

Coverture, then ſhee muſt be tyed to her Joynture onely.

Q. *Was it ſo at the Common law?*

A. Noe, but is now ſo by the ſtatute of 27. *H.* 7. *vide Vernons* caſe in the fourth part of the Lord *Cookes* reports.

Q. *Is tenant in Dower puniſhable of waſt.*

A. Tenant in Dower and by the curteſie were puniſhable of waſt by the Common law, and the other particular Tenant by the ſtatute of *Marlebridge.*

Q. *How many Ages of women are there to be obſerved in law?*

A. Eight, Firſt ſeaven yeares in ayde *pur fil marrier.* Next nine yeares to bee endowed of her husband, if her husband be ſeven yeares of age or upwards at his death, ten yeares upon raviſhment, twelve to conſent to marriage, full fourteen to be free from ward untill the age of ſixteene, ſeaventeen to be an Executor, twenty and one to doe all actes.

Q. *What doe you call Tenant by the curteſie?*

A. It is when the husband after the death of his wife, is to have an eſtate for life in the lands of the wife, and whereof ſhe dyed ſeiſed of an Eſtate of Inheritance.

Q. *What*

Q. *What Eſtate ought the wife to have in the ſaid lands whereof the husband may be tenant by the curteſie?*

A. She ought to have ſuch an eſtate as the husband is to have by whom ſhe claymeth Dower as aforeſaid. And beſides the wife muſt thereof have a poſſeſſion in fait, and not onely in law, except it be of an Advowſon, or of a rent, but otherwiſe in Dower.

Q. *What elſe is requiſite to make him Tenant by the curteſie?*

A. He muſt have a child by his wife during the Coverture, that is borne alive

Q. *May he forfeit his Eſtate?*

A. Yes, as tenant in Dower may.

Q. *May his wife hurt his eſtate, or poſſibilitie of Eſtate?*

A. Yes, if the wife commit felony before he is intituled to be tenant by the Curteſie, viz. having noe iſſue, he ſhall not be tenant by the Curteſie, but otherwiſe after iſſue.

Q. *What other particular Eſtates are there?*

A. There is tenant by elegit, ſtatute Merchant of the ſtaple.

Q. *What is tenant by Elegit?*

A. It

A. It is the Creditor or debtee that hath the moytie of all the lands of the debtor delivered unto him by way of Extent, with all the goods of the ſaid debtor untill the debt be levyed by the ſtatute of *VVeſtm.* The ſecond.

Q. What is tenant by ſtatute or Recognizance?

A. It is ſuch a creditor which hath all the lands and tenements of the debtor delivered unto him by Extent, untill the ſaid debts be paid by the yearely value thereof.

Q. VVhat if the land extended grow better and of more yearly profit?

A. Then the debtor may have an *Audita quærela*, and thereupon ſhorten the Extent and time of payment.

Q. VVhat if the Cognizee purchaſe part of the ſaid land?

A. If the Cognizee purchaſe any part of the ſaid land after the execution & extent, the whole is diſcharged; But if it be before the execution, & after the ſtatute acknowledged, it is a diſcharge for the other Feoffees of the ſaid land. And alſo if the Cognizor repurchaſe the ſaid land of the Cognizee, an extent may be ſued thereof.

Q. What if divers ſtrangers be ſeverally

verally enfeoffed of the ſaid Land, and an extent be ſued againſt one onely?

A. He ſhall have an *Audita querela* to have contribution of the reſt. But if the Conizor reſerve any part upon ſuch a Feoffement, and an extent be ſued onely againſt him, hee ſhall have a Contribution. *Quære* if his heire ſhall have Contribution.

Q. What difference is there between theſe Statutes and an Obligation?

A. Theſe Statutes binde the land from the time of the acknowledgement, and maketh it liable in whoſe hands ſoever it be to pay the Debts. But the Obligation bindeth not the lands nor goods but from the time of the Judgement.

Q. Doth a writ of waſte lye againſt ſuch a tenant?

A. No Action of waſte lyeth againſt ſuch a tenant, but an action of accompt.

Q. Beſides theſe grounds of Law, and matters before rehearſed, what is the generall learning of making and diſſolving of Contracts?

A. Firſt, it is a generall learning, that there muſt be in every Contract *quid pro quo, viz.* Some valuable conſideration between the parties to be payed or performed,

formed, either presently, or at a day to come, or else some earnest to bee given presently, otherwise the Contract is void; for *ex nudo pacto non oritur actio.* And some doubt whether a consideration past, doe make a contract good. Another learning is, that in an Action of Trespasse, *quod actio personalis moritur cum persona*, and the heire or executor shall not be charged therewith.

Q. *You have reasonably satisfied me in generall concerning grants to men, and from men; Now shew me a little how such Contracts and grants may be discharged and avoyded by the Law by parties consent, and I will make an end?*

A. First, it is a generall ground, *Quod nihil est tam conveniens naturali æquitati quam unumquodq; dissolvi eo ligamine quo ligatur.*

Q. *What doe you meane by that?*

A. As there are matters of Record, and in fait, and some matters in fait by writing, and sometime by paroll, the matter of Record generally must be defeated by the like matter, and the matter in writing by matter in writing, and not by paroll, except it be in few cases.

Q. *Put me a case thereof?*

A. If

A If I enter into a Bond to pay six pounds at a day, I may plead Payment thereof by paroll and witnesses, but otherwise of a Bond without condition.

Also every lease or estate of Franktenement or for yeares, may be drowned by taking an higher estate in the same land at any time after. Also these lesser estates may be surrendred into greater Estates, and the lesser so drowned.

Q. *Put me a case thereof?*

A. A lease is made to one for life, the Remainder to another for life, the Remainder to the third in tayle, if he that hath the first estate for life surrender to him in tayle, or in fee, the surrender is voyd, because of the meane Estate for life.

Q. *How by Releases?*

A. There it behoveth that he that releaseth hath an Estate in *Esse* at the time of the Release made, and that he to whom the Release is made hath a Franktenement in the land, or in fair.

Q. *Somewhat let me understand the nature of Tythes, and what you call them?*

A. It is commonly the tenth part of the yearely profits which the lay man pays to the spirituall man out of his lands, tenements, and hereditaments.

Q. *How*

Q. *How many manner of Tythes are there?*

A. Three, viz. temporall, prediall, and mixt.

Q. *When began these tythes?*

A. Abraham gave the first tithes to *Melchisedeck?*

Q. *Did* Abraham *then give the tenth of his increase?*

A. Many doubt whether it was more or lesse.

Q. *May the spirituall man take all those tithes without deliverie?*

A. Noe, although they be severed the ninth from the tenth, but must be set out by the lay man, for *Melchisedeck* did not take his Tythes, but *Abraham* gave his tithes.

Q. *What remedy had the spirituall man if the lay man would not give his tythes?*

A. He had noe remedie before the statute in 2. E. 6. but to sue for the same in the spirituall Court, for by that statute treble damage are given to the spirituall man, upon wrongfull deteyning or taking away the said Tythes.

Q. *Who may prescribe to have tythes or not to pay Tythes?*

A. Noe lay man except the King, or

the Patron ought to have Tythes in their owne right, or prescribe to pay tythe. *Vide Cooke le second part del Report Ca: Levesque de Winchester.*

Q. Are tythes alwayes to be payed proprio genere.

A. Noe lay man can prescribe in *non decimando*, but in *modo decimandi*?

Q. Of what things are tythes properly to be payd?

A. Out of such things as doe increase and bring a yearely profit, as of Corne, grasse, wood, Cattle, *Silva cedua*, wooll, calves, and such like.

Q. What Tythes are to be paid in cutting downe of great trees?

A. None at all, because it is a destruction of the stock, and so it seemeth of all wood above twenty yeares growth.

Q. Where are those tythes to be recovered?

A. If the right of tythe be in question in the spirituall Court; but if the lay man prescribe *in modo Decimandi*, then upon the libel, he is to sue a Prohibition alleaging his manner of tithing, and shall be tryed at the common law by a Iury, for the spirituall Court will allow noe such plea, but in *proprio genere*.

Q. To

Q. *To what Spirituall man is the Lay man to pay his Tythes?*

A. Moſt commonly to the Parſon or Vicar of the Pariſh.

Q. *What? was it alwaies ſo?*

A. No, before the Councell of *Lateran*, the Lay man might have pay d his Tythes to any Spirituall man whatſoever that would take cure of his ſoule.

Q. *Are all payed at this day to the Parſon or Vicar of the Pariſh?*

A. No, ſome were given out of houſes of Religion, as to Abbies, Priories, Nunneries, Chaunteries, and ſuch like.

Q. *How happeneth it that Lay men have, and enjoy Tythes contrary to the Law?*

A. That beganne upon Appropriations.

Q. *What meane you by that Sir?*

A. It is a Maxime in Law, that the fee Simple as well of Tythes, as of all other Lands and Tenements, is ſuch in ſome parſonas the fee ſimple of tithes in the Ordinary, Patron, or Incumbent, which three together may grant or charge the ſaid Tythes at their pleaſures.

Q. *What meane you by that?*

A. I meane that the Spiritualit heretofore abounding in Livings, wer content with the Patron for gaine or fa-vour to grant a great part of the Tythe to any Lay man.

Q. *What did they usually grant?*

A. Most commonly the Rectory o Parsonage either in Fee simple, or for long terme, and for a small rent.

Q. *How was the Cure then served an discharged?*

A. By that means a poore Vicaridg was hatched out of a great Parsonage which Vicar in these daies discharged the cure, and the Lay man holdeth th residue of the Parsonage.

Q. *May such Leases bee made at thi day?*

A. No, divers Statutes have abridge their power in such case, and especially the Statute in 13 *Eliz.* So that they ca make no good Lease but for three lives or one and twenty yeares, according t the Statute.

Q. *Now lastly a word or two concernin the quantity of Lands and Tenements, an their speciall names and tearmes in La and of all manner of Reliefs, &c. d for the same, and then I shall fully mak an end?*

A. Fir

A. Firſt you muſt note, that two Fardells of Land make a Nooke of Land, and two Nookes make halfe a Yard of Land, and two halfe Yards make a Yard Land, and four Yard Lands make a Hide of Land, and foure, and ſome ſay eight Hides make a Knights Fee, the Reliefe whereof is 5.l. and ſo ratably. And every Knights Living or Revenue heretofore was, or ought to have been 20.l. *per annum.* And the yearely Revenue of every Baron was, or ought to have been foure hundred Markes. And the yearely Revenue of every Count or Earl 400.l. whereas the Reliefe of a Baron was, and is 100. Marks, of an Earle or Count 100.l. and of every Duke 800.l. So you may note, that the Knights Revenue at the firſt being 20.l. *per annum*, the Baron at the firſt was to have thirteene Knights Fees, and a quarter of a Fee. And the Earle or Count twenty Knights Fees, and the Dukes forty Knights Fees, by which proportion the Reliefes aforeſaid were rated, as before is mentioned; which is the reaſon that Noblemen ought not to be arreſted or attached by their bodies, becauſe the Law doth

presume that they have sufficient Land and Tenements to discharge any Suit.

And they have these Dignities given them by the King for two purposes, *viz. ad consulend. Regi tempore pacis, & defendend. Regem tempore belli*; in token whereof they are adorned with a Cap of honour on their heads, and with a sword by their sides.

Also there is another relieſe due after the death of the Tenant that holdeth by Grand Serjeantie, and likewise after the death of the Tenant that holdeth in Soccage, whereof I have made mention before. And the Relieſe for lands in Soccage is due to the Lord immediately after the deceaſe of the Tenant, of what age soever the heire is. But of the relief when the heire hath not been in Ward, and is of full age, at the death of his Ancestor, such a Relieſe is due presently after the death of his said Ancestor, being Tenant of any such lands, or of any such Estate, as before is mentioned. *Vale.*

Quicquid agas prudenter agas, & respice finem,
Lex plus laudatur quando ratione probatur.

A

A BRIEFE TREATISE

Concerning

TENURES & ESTATES

in Lands and other Hereditaments, and of Chattells reall and perſonall.

And how any of them may be conveyed in a legall forme by Fine, Recovery, Deede or Word, as the Caſe ſhall require.

By the former Author W. Noy.

LONDON,
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A BRIEFE TREATISE Concerning Tenants and Estates in Lands, &c.

Hereditaments and Chattells.

THe most part of all such things which the Kings Majestie or any of his Subjects doth or may enjoy, are, according to the tearmes used in the lawes of England, either Hereditaments or Chattells, wee call such things Hereditaments, which are Hereditary, and in a naturall body may discend from Ancestor to heire, and from heire to heire for ever, or which in a body politique may successively or otherwise have a perpetuall continuance, as Honours, Messuages, Dignities, Priviledges, Liberties and such like. And to some purpose it maketh no matter what estate or interest the

Hereditaments Naturall and Politicall.

the party hath which enjoyeth any such thing; for although hee hath therein the baseſt or meaneſt eſtate that may be, yet the name of an hereditament in a thing enjoyed in a natural ſence remayneth, becauſe it is in his kind hereditary, and an eſtate of inheritance hath therein alwaies his being in ſome perſon, except by ſome accident in ſome ſpeciall caſe it happen to be for a time ſuſpended, or for ever extinguiſhed, as ſhall afterwards appeare. And therefore he that hath but a tearme of yeares in Lands, granteth his intereſt in all the hereditaments which hee occupieth or enjoyeth, his intereſt in the lands is thereby granted; but yet nevertheleſſe hee that hath therein but a terme for certaine yeares, hath but a Chattell, and in regard thereof, in common ſence it looſeth the name of an hereditament of that, in the moſt uſuall and proper ſence it retaineth the name of an hereditament onely in ſuch perſon as hath therein an eſtate of Free-hold or inheritance. And therefore if a man ſeiſed of certaine lands in Fee, and poſſeſſed alſo of other lands for tearme of yeares, doth demiſe all his hereditaments, to another for certaine yeares, the lands, wherein the Leaſſor had but a terme doe not paſſe thereby no more then they

Grant the intereſt of all the hereditaments which one occupieth and enjoyeth, doth grant Chattells for yeares alſo.

they should passe in the same case if the Lessor had demised all his Tenements: and yet in a naturall sence Lands receive the name of a Tenement and Hereditament, as well in a Termor, as it doth in him that hath therein a Freehold or Inheritance.

Also every Hereditament is either { Locall, Transitory, or, Mixt.

1. Locall, as Messuages, which are vulgarly called houses or lands, be they Arrable Meadow or Pasture, &c. Locall.

2. Transitory, as Dignities, Priviledges, Liberties, Rents, Services, and such like. Transitory.

3. Mixt, as Honours, or Mannors, which consist of Messuages, Lands, Services, Priviledges, &c. Mixt.

Rectories or Parsonages when they consist of things Locall and Transitory, as Land, and Tythes, and such like. But a Rectory when it consists onely of Tithes (as some doth) is a Transitory Hereditament, and the observation of this difference is very materiall in matter of Conveyance, as shall be hereafter declared. But it seemeth that such things, whereof no estate of Inheritance

is,

is, or ever was in being, are not to bee termed Hereditaments. Alſo if a man ſeized of lands in Fee ſimple, granteth out of the ſame a yearely rent, or common of paſture for life, or for yeares, this rent or common (as to me ſeemeth) is not properly any Hereditament; becauſe no eſtate of inheritance is, or ever was thereof in being. But if a man ſeiſed of Fee in lands, doth by ſufficient conveyance in the Law demiſe the ſame to another for terme of his life, & limiteth the remainder thereof to the right heires of a man that is living at the time of ſuch demiſe, no eſtate of inheritance is thereof in being in any perſon whatſoever; for by the Law the eſtate of inheritance paſſeth out of the Leaſſor preſently, and yet it cannot bee in ſuch heire to whom it is ſo limited, untill the death of his Anceſtor; for untill his death he can have no heire, but the perſon which is likely to be his next heire, is in the meane time onely termed his heire apparent. Alſo if *I. S.* ſeiſed of a Rent in Fee, doth by ſufficient conveyance grant the ſame to another for life or for yeares, and after the ſame *I. S.* doth releaſe or grant the rent unto him

him that is Tenant in Fee Simple of the land out of which it is iſſuing, and to his heires, in which caſe the inheritance of the rent is extinct in the land; yet in a common and proper ſence during the ſaid eſtate for life, in the ſame, and in a naturall ſence, during the ſaid eſtate for yeares, it reteineth the name of an Hereditament: For in both theſe caſes, an eſtate of Inheritance in the thing demiſed or granted, had once his being; albeit by matter *Ex poſt facto* in the ſaid caſe of Remainder, it remaineth in ſuſpence and abeyance for a time, and in the other caſe extinguiſhed for ever. And in that which followeth, when I ſpeake generally of things Hereditary, or Hereditaments, I meane thereby Hereditaments according to the common ſence: Chattels are ſuch things as are not hereditary, but teſtamentary, as moveable goods, Leaſes for years, Wardſhip of lands and body, and ſuch like: And they are called teſtamentary, as well becauſe by the courſe of the common Law, things onely of that nature, and not hereditaments (as ſhall be hereafter declared) might bee diſpoſed by Will and Teſtament. As alſo becauſe after the death

Diverſity.

death of such Testator, the Law doth transferre the same to the Executor of his last Will and Testament for the payment of his debts and legacies; for until a Statute made 32 *H.* 8. Hereditaments were not disposeable by Will, if the Testator had therein any greater Estate than for yeares, except such use as is aforesaid, and Hereditaments that were devisable by Will, by a speciall Custome, and not by the common Law. And the cause whereof an estate of Inheritance of a use was Testamentary by the Common Law, did arise of the same estimation which the Law then had thereof, being lesse than of a Chattell; for a Chattell was protected by Law against wrongs, but so was not a use apt remedy by Law, being for the one ordained, and not for the other. But it is to bee noted, that albeit other Hereditaments were not Testamentary by the course of the common Law; yet by especiall custome in some Cities and Burroughs, the Lands and Tenements therein scituate were alwaies Testamentary, in regard of their own nature; as Chattels were, but *sub modo* by a speciall custome.

Of

Of Chattels, ſome are Reall, and ſome are Perſonall: Chattells Reall are properly ſuch as doe ſavour of the Realtie (*viz.*) do conſiſt of ſuch things as are in their nature Hereditary, Wardſhips of Lands, or of other Hereditaments, Leaſes, or Intereſt for yeares, or at will derived out of any thing whereof an Eſtate of Freehold or Inheritance hath or had a being: Chattells perſonall are goods moveable, as Goods, Plate, Money, Oxen, Kine, *&c.* And hereby it appeareth that ſome Chattels perſonall are without life, and ſome living: But it is to bee obſerved yet, that living Creatures *feræ naturæ*, as Deere, Conies, Hares, and ſuch like, are not Goods or Chattells, except they are made tame. Alſo Characters or Deeds of any eſtate of Inheritance or Freehold, albeit they be moveable, are not Chattels. Alſo Chattels reall, are either Locall, Tranſitory, or Mixt, in ſuch caſes as is before obſerved of Hereditaments; for albeit they are termed chattels, in regard of the feebleneſſe of their eſtates, yet the things enjoyned by force of ſuch intereſts, are for the moſt part by nature Hereditaments; and of theſe diffe-

Reall, or Perſonall.

Without life or living.

Locals Tranſitory. Mixt.

ferences in Chattells reall, some profitable use may be made, as hereafter shall also appeare. And it is to be noted that some interests for years are derived neither from any Inheritance or Freehold, but onely from a mans person: As if a man doth by deed create an Annuity for years, without limiting it to Issue, out of any Land or Tenement, the same is derived onely from the person which granted it, who in his life time, and his Executors or Administrators that represent his person after his death, shall be onely charged therewith; and therefore as well such interest in an Annuity, as also a Wardship of the body of an Infant, which consisteth of a person, may in a strained sence be termed personall. But albeit the words *Gaard. de Terre.* in the division of Possessions in the beginning of Mr. *Littletons* Tenures, doe seem to imply, that Wardship of Body is not to be reckoned in the number of chattels reall; yet it appeareth by other expresse bookes, that Wardship of Body is no lesse reall then the Wardship of Lands: And therfore such implication as aforesaid, is no proofe, that it is to be reckoned in the number of chattels personall,

ſonall otherwiſe then in a ſtrained ſence; for things Tranſitory or Moveable, conſiſting of any eſtate (As Wardſhips conſiſting of a terme during the minority of the Ward, or a terme in an annuity, villeine, *&c.*) are not properly called chattels perſonal, but real. Furthermore, becauſe ſome things which may be enjoyed in forme aforeſaid, are neither Hereditaments nor Chattels, It is therefore meet to conſider, in what generall thoſe things are compriſed: And as to that it is to be obſerved, that not onely thoſe things which are neither Hereditaments nor Chattels, but alſo all Hereditaments whatſoever, in every ſuch perſon that hath therein any greater eſtate than for yeares, are vouched under the generall name of Freehold, as in the Chapter next following it doth more at large appear.

Franktenement.

WHat is a Freehold, and what is a Chattell, is very lively ſet forth in the beginning of *Littletons Tenures*, by the ſaid figure of diviſion of Poſſeſſions: whereby it appeareth, that

al manner of eſtates of inheritance, or for life (bee they eſtates according to the Common Law, or according to the cuſtome, are compriſed in the name of Franctenement) That is to ſay, every of them is aptly termed a Freehold within Judgement of Law, is greater than any eſtate for yeares, though it be made for many thouſand yeares, in regard of any probable preſumption that eſtate for life may be more perdurable, than ſuch eſtate for yeares: but in regard a Freehold, which is proper as well to any eſtate of inheritance, as to an eſtate for life, in accompt of Law hath alwaies been had in greater eſtimation than any eſtate for yeares; and for this onely cauſe a Terme for yeares is ſubject to a forfeiture by an *Vtlary* in a perſonall action for an offence, wherein the offender is *felo de ſe*, and ſuch like, but no eſtate of Freehold (unleſſe it be by ſome ſpeciall cuſtome) is ſubject to any forfeiture of that kinde. The difference between a Franctenement and Chattels being ſo diſcovered as is aforeſaid; it ſeemeth fit to proceed to the conſideration of Eſtates. An Eſtate is that which in Latine wee call *Status*; and it may apt

Felo de ſe forfeiteth all Chattels.

Diverſities.

apely be thus defined, viz. An eſtate is a permanent abode or Continuance for a time or for ever, in a thing of ſuch nature as either is, may, or might be hereditary, as Mannors, Mills, Lands, Tenements, Rents, Services, Commons, Dignities, Liberties, Franchiſes, Priviledges, Offices, and ſuch like; but no eſtate can be proper to Chattells perſonall. And for that cauſe a gift thereof for a momentary time is of like force as if if it were given for ever. But it may be objected that ſo it may be ſaid of a terme for yeares in lands or other hereditaments (that is to ſay) if ſuch a terme be given or granted for an houre; it is of like force, as if it were given or granted for ever, yet ſuch terme therein is properly called an eſtate. To which objection I anſwer, that although the lawe be ſo in a grant of a terme, which is as much to ſay, his whole intereſt is the thing, wherein he is ſo intereſſed (viz.) his land, and not his terme therein for one houre; the Grantee ſhall enjoy it no longer then for the time ſo lymitted, but otherwiſe it is of ſuch gift or grant of Chattells perſonall; but herein a difference is to be obſerved, Difference.

The definition of an eſtate.

ſerved, betweene ſuch a gift or grant of goods moveable, and a demiſe thereof; for although a grante for yeares of things properly devitable doth enure as a demiſe or leaſe thereof, yet ſuch grant hath not the like operation in a thing deviſable; only in an unproper or borrowed ſence.

And therefore albeit a grant of goods moveable for a time, doth alter the property for ever; yet a demiſe thereof for a time ſhall only enure as a diſpoſition of the proffits thereby ariſing during that time. As for example. If a ſtock of ſheepe or kine be leten for certaine yeares, the Leaſſee hath not thereby the generall property thereof, but onely a ſpeciall intereſt or property therein, by force whereof he may take the proffit thereof during the terme; but ſuch intereſt therein is not properly an eſtate. And albeit it be vulgarly called a leaſe of ſuch Kine or ſheepe, yet it is not ſo to be termed, otherwiſe then in a borrowed ſence; For if a man ſo intereſſed therein is likewiſe poſſeſſed of other leaſes of lands, and granteth all his leaſes to another, his intereſt in theſe Ghattells perſonall, or the profits thereof, will not paſſe thereby

thereby. Of Eſtates ſome are Generall, and ſome Particular, as hereafter appeareth. 1 Generall 2 Particular

Generall Eſtates.

A Generall Eſtate is that which wee terme an Eſtate in Fee Simple, which is the greateſt and largeſt Eſtate that may be; and it is divided by *Littleton* in his firſt Chapter of his firſt booke according to the Etymology of the words Fee Simple, which in Latine are called *Feodum ſimplex, quia feodum idem eſt quod Hereditas, & ſimplex idem eſt quod legitimum vel purum, & ſic Feodum ſimplex idem eſt quod hereditas legitima vel hereditas pura*; and it received the name of a generall eſtate, not onely becauſe it was the moſt common and uſuall of all other eſtates; but alſo for that in regard of the ampleneſſe thereof it is exempted from the number of all particular eſtates.

But yet it is further to be obſerved, that there be three kindes of Fee Simple; The firſt a Fee Simple without any other addition. The ſecond a Fee Sim-

ple determinable. The third a base Fee Simple.

The first of these is more generall and common than any of the residue, and it can never perish so long as the substance, whereof the estate ariseth, hath any being. And therefore albeit that hee, which is seised of such estate, happen to to dye without heire, yet the same estate is not extinguished but by act in Law, in some other degree transferred to the Lord, of whom the said Lands were holden by way of Escheate, because the land wherein the Tenant hath such estate, doth still continue; but if a man seised in Fee of a rent charg, or rent seck, dyeth without heire, this Fee simple, although it be of the first sort, doth perish, because the rent, wherein hee hath estate, being transitory, is by such dying without heire, quite swallowed up and drowned in the land, out of which it did issue. And albeit a Fee simple of this kinde is sometimes absolute, sometimes conditionall, yet the condition thereunto annexed, doth not alter the same in nature or kinde, but onely in the accidentall quality.

Absolute Conditionall.

Secondly

Secondly, a Fee simple determinable is such as may be determined bya speciall limitation before the efluction of the time comprised in the generall and proper limitation.

Thirdly a base Fee-simple is when two Fee-simples in one thing are in being at one time, the one being in nature more worthy then the other. In which case that that is the least worthy, is called a base Fee-simple, because it is base in respect of the other.

There is a generall rule in the law, that none can have an estate lively, but the Donee, which is the party to whom it is given, or the heires of his body. And it is further to be observed, that every estate of inheritance is either Fee-simple, or Fee-taile; of the one hath been sufficiently spoken for this time: For the other, some further touch shall be given in the Chapter next following.

Every estate of inheritance is either fee-simple or fee-tayle.

Particular Estates.

A particular estate is such as is derived from a generall estate by sepa-

paration of one from the other; As if a man ſeiſed in Fee ſimple of lands or Tenements, doth thereof Create by gift, or grant an eſtate Tayle, or by demiſe, a leaſe for life, or any eſtate for yeares, theſe are in the Donee or Leaſſee particular eſtates in poſſeſſion, derived and ſeparated from the Fee ſimple in the Donor or Leaſor, in reverſion. Alſo if lands be demiſed to *A.* and the eſtate tayle lymitted to *B.* theſe are particular eſtates derived *ut ſupra*, and ſeparated in intereſt from the Fee ſimple in remainder given to *C.* albeit the ſame remainder doth depend upon thoſe particular eſtates. And of particular eſtates, ſome are Created by agreement betweene the parties, as the particular eſtates before ſpecified; and ſome by the act of law, as the ſtate of tenant entayle, apres poſſibility, d'iſſue extinct, Eſtates by the Curteſy of England, Dower and wardſhipp. For albeit an eſtate in Dower be not compleate, untill it be aſſigned, which oftentimes is is done by aſſent and agreement betweene parties; yet becauſe the party, that ſo aſſigneth the ſame, is compellable ſo to doe by courſe of law; that eſtate is alſo ſaid to be only created by law.

Alſo

Alſo an eſtate at will is a 'kinde of particular eſtate, but yet not ſuch as maketh any diviſion of th' eſtate of the Leaſor, for notwithſtanding ſuch eſtate, the Leaſor is ſeiſed of the lands in his demeaſne, as of Fee in poſſeſſion, and not in reverſion: Alſo an eſtate at will is not ſuch a particular eſtate, whereupon remainder may depend. But of all the ſtates before mentioned many fruitfull rules and obſervations are both generally and particularly ſo lively ſet forth by the ſaid Mr. *Littleton* in the 1.2.4.5 6.7. and 8th. chapters of his firſt booke, which is extant aſwell in Engliſh as in French; whereunto I refer you.

Poſſeſſion.

IT is further to be obſerved, that all eſtates that have their being are in poſſeſſion, reverſion, remainder, or in right, but of all theſe poſſeſſion is the principall, for that it is the full fruition of all the fruite of the eſtate. There are two degrees of poſſeſſion, The firſt and Chiefeſt poſſeſſion in *fait*, the other poſſeſſion in law. Poſſeſſion in *fait* or deede is ſuch as is before ſpoken of, and that is moſt

Two degrees of poſſeſſion
1 poſſeſſion in *fait*.
2 poſſeſſion enley.

moſt proper to an eſtate which is preſent and immediate, but ſuch poſſeſſion of immediate eſtate, if it be no greater then a terme; doth operate and endure to make the like poſſeſſion of the Freehold, or Reverſſion. When a man is ſaid to have a terme, it is to be intended a terme of yeares; when it is ſaid, a man to have the Fee of Lands, it is alſo to be intended a Fee ſimple; poſſeſſion in Law, is that poſſeſſion which the Law it ſelfe caſteth upon a man before any entry or peraney of profits. As if there be a Father and Sonne, and the Father dyeth ſeiſed of lands in Fee, and the ſame doe deſcend to his ſonne as his next heire, in this caſe before any entry, the ſonne hath a poſſeſſion in Law. So it is alſo for a Reverſion expectant, or a Remainder dependant upon a particular eſtate for life; In which caſe, if Tenant for life die, he in reverſion or remainder before his entry, hath onely poſſeſſion in Law. All manner of poſſeſſions, that are not poſſeſſions *en fait*, are onely poſſeſſions in Law; and it is to bee obſerved, That if a man have a greater eſtate in Lands than for yeares, the proper phraſe of ſpeech is, that

is thereof ſeiſed; but if for yeares only, then he is thereof poſſeſſed; but nevertheleſſe the ſubſtantive poſſeſſion is proper, as well to the one as the other.

Reverſion.

A Reverſion is properly an Eſtate which the Law reſerveth to the Donor, Grantor, Leaſſor, or ſuch like, when he doth diſpoſe a Leaſe, or other eſtate in Law, then that whereof he was ſeiſed at the time of ſuch diſpoſition. As if a man ſeiſed of lands in Fee, doth give the ſame to another, and the heires of his body, or if hee doe demiſe the ſame for life or yeares, in this caſe the Law reverteth the reverſion thereof in Fee to the Donor, or Leaſſor, or his heires, becauſe hee departed not with his whole eſtate, but onely with a particular eſtate, which is leſſe than his eſtate in Fee: And ſuch reverſion is ſaid to be expectant upon the particular eſtate alſo, if he that is but a Tenant for life of land by deed or parol, giveth the ſame to *I.S.* in tayle, or for terme of his life, which is a greater eſtate than he may law-

lawfully disposse; in this case the Law reserveth a reversion in Fee in such Donor, though he were formerly but Tenant for life. And the reason thereof is, for that by such unlawfull disposition, which by deed or word cannot be without livery and seisin, he doth by wrong pluck out the rightfull estate in Fee, that was thereof formerly seised in reversion or remainder, and by force thereof, by priority of time gained in an instant, he was seised of a Fee simple at the time of the execution thereof. But if a man seised of lands in Fee simple, giveth the same unto *A.* and his heires untill *B.* do dye, without heire of his body; in this case the Law reserveth no reversion in the Donor, because the state so disposed to *A.* is a Fee simple, which though it be a Fee simple determinable, is in nature so great, as the state which the Donor had at the time of such gift, and consequently he departed thereby with all his estate. And thereby an apparent difference is between a gift made to *A.* and the heires of his own body, and a gift made to him and his heires untill *B.* dye without heire of his body; for in the one case the Donee hath but an

an eſtate taile, in the other a Fee ſimple determinable; *A.* hath a poſſeſſion of reverſion; for if *B.* dye without heire of his body, then whether *A.* be living or dead, the land ſhall revert to the Donor. But ſuch poſſibilitie of Reverſion is much differing from the nature and property of a Reverſion; for he that hath but ſuch a poſſibility, hath no eſtate, nor hath hee power to give his poſſibility; but in the other caſe, the Donor hath eſtate in Fee, and therefore hee hath power to diſpoſe thereof at his pleaſure.

Remainder.

A Remainder is a remnant of an eſtate diſpoſed to another at the time of creation of ſuch particular eſtate whereupon it doth depend. As if *I. S.* ſeiſed of lands in fee, demiſeth the ſame to *B.* for life, the Remainder to *C.* and the heires of his body, the remainder to *D.* and his heires; In this caſe *B.* hath a particular eſtate for life, and the remnant of the eſtate of the Leaſſor is then alſo diſpoſed to *C.* and

D.

D. ut supra whereby *B.* hath an estate for life: *C.* A remainder in tayle: and *D.* remainder in Fee depending in order upon the particular estate in possession and in every remainder five things are requisite.

5 things Required in a remainder.

1. That it depend on some particular estate.

2. That it passe out of the Donor grantor or leassor at the time of Creation of the particular estate, whereupon it must depend.

3. That it vest during the particular estate, or at the instant time of the determination thereof.

4. That when the particular estate is created, there be a remnant of an estate left in the Donor to be given by way of remainder.

5. That the person or body, to whom the remainder is limitted, be either capable at the time of the limitation thereof, or else *Potentia propinqua* to be thereof capable during the particular estate; If lands be given to *I. S.* and his heires the remainder for default of such heire, to *I D.* and his heirs, that remainder is voyd because it doth not depend upon any particular estate. But

if

If land be given to *I D.* and his heires during the life of *I, N.* the remainder to *I B.* this remainder is good, for it is not limitted to depend upon a Fee-simple, but upon a particular estate, which is only called an estate for life of *I B.* discendable. If lands be given to *B.* For twelve yeares, if *C.* Doe so long live, the remainder after the death of *C.* to *D* in Fee, the remainder is voyd, for in that case it cannot passe out of the *Leor. al temps dl Creation dl perticuler estate pr-ans.* But if a lease be made to *B.* for life, the remainder to the heires of *C.* who is then living, this remainder is good upa contingency, That if *C.* Dye in the life of *B.* For this remainder may well passe out of the Leasor, presently in abayance, without any inconvenience, because only the inheritance is separated from the Freehold as in abayance.

Reason.

No remainder can depend upon a Fee simple.

But upon a particular estate descendable.

Nota.

Reason.

If lands be given for life with a reremainder to the right heires of *I S.* and the tenant for life dieth in the life of *I S.* This remainder is void, because it did not vest or settle either during the particular estate, or at the time of the determination thereof; for untill *I S.* dye, no person is thereof, capable by

by the name of his heires; but if lands be given to *I. S.* for terme of his life, the remainder to his right heire in the ſingular number, and the heires of his body; and after *I. S.* hath iſſue a ſon and dyeth, this is a good Remainder, and the ſonne hath thereby an eſtate tayle; for although it were unpoſſible, that ſuch remainder ſhould veſt during the particular eſtate; becauſe during his life none could be his heire; yet it might veſt at the inſtant of his death, which was at the time of his determination of the particular eſtate. Concerning a fourth thing, if a man ſeiſed of lands in Fee, granteth out of the ſame rent or common of paſture, or ſuch like thing (which before the grant had no being) to *I. S.* for terme of his life, the remainder to *I. D.* in Fee, this remainder is voyd; becauſe of this thing granted, there was no remainder in the grantor to diſpoſe. And whereas ſome heretofore have been of opinion, that albeit the ſame can take no effect as a remainder, yet it ſhall take effect as another grant of a new rent or common, *ut res magis valeat quam pereat.*

There is a rule of Law, that all things enjoyed

enjoyed in a ſuperior degree, ſhould not paſſe under the name of a thing in an inferior degree: and therefore if lands be given to two perſons, and unto the heirs of one of them, or unto the husband and wife, and the heires of the husband, and he that hath the eſtate of inheritance granteth the reverſion of the ſame land to another in Fee, ſuch grant is voyd, becauſe the grantor thereof was ſeiſed in a ſuperiour degree, *viz.* in poſſeſſion, and not in reverſion, as appeareth 12°. *Edw.* 4. 12 & 13 *Edw.* 3. *Brooke, Title of Grants.* And concerning the fift and laſt thing; If a Leaſe be made of Land for terme of life, the Remainder to the Major and Commonaltie of *D.* whereas there is no ſuch Corporation then in being, this Remainder is meerly voyd; albeit the Kings Majeſty by his Letters Patents doe create ſuch Corporation during the particular eſtate, at the time of ſuch grant the Remainder was voyd, becauſe then there was no ſuch body Corporate thereof capable, or in *potentia propinqua* to bee created or ſo made capable thereof during the particular eſtate; but the poſſibility thereof was then forraigne,

A Maxim.

Reaſon.

A

and not probably intended. The like law is if a Remainder bee limited to Iohn the Sonne of *T. H.* who had then no Sonne, and afterwards during the particular estate, a sonne is born, who is named *Iohn*, yet this Remainder is voyd; for at the time of such grant, it was not probably to bee intended that *T. H.* should have any sonne of that name. Also before the dissolution of Abbies, if a lease of lands were made to *I. S.* for life, the Remainder to one that then was a Monk, such Remainder was voyd, for the cause before alleadged, albeit he were deraigned during the particular estate: but if such Remainder had been limited to the first begotten Sonne of *I. S.* it had been good, and should accordingly have vested in such sonne afterwards born during the particular estate.

Right.

A twofold Right.

A Right in Law is either clothed or naked. A Right clothed is when it is wrapped in a Possession, Reversion, or Remainder. A naked Right, which is also most commonly called

Right,

Right, is when the ſame is ſeparated from the poſſeſſion or remainder by diſſeiſin, diſcontinuance, or other deveſting and ſeparating of the poſſeſſion from it. As for example, if a leaſe of land be made for life to *I. S.* the remainder to *I. D.* in Fee; in this caſe *I. S.* hath a Right cloathed with a poſſeſſion, and *I. D.* clothed with a remainder; but if a ſtranger that hath no right or title, doth in the ſame caſe enter into the land by wrong, & put *I. S.* forth of poſſeſſion, ſuch entry by wrong, is called a diſſeiſin: & therefore the poſſeſſion is moved from the right; for by reaſon thereof, the diſſeiſor is ſeiſed of the land, and *I. D.* hath alſo the like naked right to the Remainder by ſuch diſſeiſin, is likewiſe deveſted and plucked out of him, and cannot be reveſted in him during the right of ſuch particular eſtate, unleſſe the poſſeſſion of the particular Tenant be therewith reveſted, which muſt bee by his entry, or recovery by action, and by ſuch entry of the particular Tenant, or by his recovery with execution, the Remainder ſhall be reveſted as well as the particular eſtate. Alſo there is a Right in Goods and Chattels, as well as

in Lands, Tenements and Hereditaments, which is alſo clothed with a poſſeſſion, ſo long as the rightfull proprietor hath the ſame, but if another doth take them from him by wrong, he now hath onely a naked Right to the ſame, which cannot be by him granted for the cauſe before alleadged; but yet he may releaſe his right therein to him that is thereof poſſeſſed; for the ſame reaſon it is before alleadged of a releaſe of Right in Land, and if ſuch right happen to be forfeited to the King, his Highneſſe may grant the ſame by his Prerogative.

Common Recoveries.

A Common Recovery is ſuch as is ſuffered and recovered by the aſſent of both parties to the ſame of any Mannors, Lands, Tenements, Advowſons, Rents, Services, or other Hereditaments for ſuch eſtate thereof, and to ſuch uſe or uſes as are between them agreed upon; and it is moſt commonly ſuffered by the Writ of *Entry ſur diſſeiſin in le poſt.* the nature of which Writ is ſufficiently ſet forth by Juſtice *Fitz-Herb.*

Herb. in his book of *Natura Brevium*, albeit sometimes it hath been, & may be also used in other actions. And such common recovery is usuall by single, double, or treble voucher, as the cause doth require. And for the better understanding hereof, it is requisite to observe the terms of Law used therein. The immediate party that recovereth, is called the Recoveror; and the party against whom the Recovery is had, is called the Recoveree; but in the proceeding therein, hee that is to recover is called the Demandant, and the party against whom the immediate recovery is to be had, is called Tenant; for it is to be noted, that he must be Tenant of the Freehold, or else the Recovery cannot be a good and sufficient assurance in the Law. A voucher is the calling into the Court of some other person to warrant the land; and he that first voucheth (*viz.*) he that calleth another to warranty, is the Tenant, and the party vouched termed the Vouchee or Tenant by the warrantie. And in a Recovery with a single voucher, are included two Recoveries, *viz.* one at the suite of the Demandant against the Tenant, and another at the suite of the

Tenant againſt the Vouchee. And if it be with a double Voucher there are included in it, three Recoveries, one by the demand againſt the Tenant, one other by the Tenant againſt the Vouchee, and the third by the firſt Vouchee againſt the ſecond Vouchee. And in a Recovery with a treble Voucher, are included foure Recoveries, whereof three are ſuch as are laſt mentioned, & a fourth is a Recovery by the ſecond Vouchee againſt the third; and in theſe Reveries the Demandant hath Judgement to recover the land againſt the Tenant, and the Tenant hath likewiſe Judgment to recover in value againſt the Vouchee; and if it be with a double Voucher, the firſt Voucher hath alſo the like Judgment to recover in value againſt the ſecond; and if it be with a treble Voucher, the ſecond Vouchee hath the like Judgement againſt the third. And the Record alſo maketh mention of the execution of the Judgement againſt the Tenant by Entry, or Writ of *Habere fac ſeiſinam* accordingly. And when ſuch Recovery is ſo executed, the uſes agreed upon, do forthwith ariſe out of the Lands, Tenements, &c. ſo recovered

red according to the mutuall agreement of the parties. The ſcope of a common Recovery, with a ſingle Voucher, is to barre the Tenant and his heires of ſuch only eſtate taile which then is in him, to barre others of ſuch eſtates as they have in any Reverſion expectant, or remainder dependant upon the ſame. And of all Leaſes and Incumbrances derived out of ſuch Reverſions or Remainders. Recoveries with ſingle voucher.

The ſcope of a common Recovery with a double Voucher, is to barre the firſt Voucher and his heires of every ſuch eſtate as at any time was in the ſame Voucher, or any of his Anceſtors, whoſe heire hee is of ſuch eſtate; and all other perſons of ſuch right to Reverſion or Remainder, as were thereupon at any time expectant or dependant; and of all Leaſes, Charges, and Incumbrances derived out of any ſuch reverſion or Remainder, and that will be alſo a perpetual bar of ſuch eſtate whereof the Tenant was then ſeiſed of in reverſion or remainder expectant, or dependant upon the ſame, &c. Recovery with double voucher.

The ſcope of a common recovery with a treble Voucher, is to make a perpetuall barre of the Eſtate of the Tenant, and of Recovery with treble voucher.

every

every such estate of inheritance as at any time had been in the first or second vouchee, or any of them, or either of their Ancestors, whose heires he, or they are of such estate, and as well of every Reversion thereon dependant, as also of all Leases, Estates, Charges, and Incumbrances derived out of any such Reversion or Remainder.

The Law doth so protect the Kings Possessions, that they cannot be devested or taken from him by any faigned Recovery, Disseisin; and such protection thereof doth also support and preserve the remote reversion and remainder pursuing the same, that they cannot be devested by a faigned recovery suffered by Tenant in taile in possession, or by his Feoffement, or by any disseisin of the Freehold; but yet such Recovery will be sufficient of the particular estate taile of the Recoveree or Vouchee, and of such Reversion there upon dependant as are in *esse* between his estate and Remainder in the King, unlesse the estate taile of the Recoveree or Vouchee were created by Letters Patents of his Highnesse, or of some of his Progenitors, or by his, or some of their provision.

Fine

AS a common Recovery is an assurance of the greatest force to barre such reversions and remainders as are aforesaid in the precedent Chapter, so to another purpose, that is to say, to Conclude strangers of their right, if they doe not make their claime according to the forme of the Statutes in that behalfe made: a Fine, is before all other assurances to be preferred, and it receiveth the name of a Fine, *Quia finis finem legibus imponit.* In every fine there are two severall parties, the Commissor, and the Commissee; the party levying the Fine is called the Commissor, and he to whom it is levyed, is called the Commissee. A fine is partly said to be levyed, when it is knowledged, in the Court, or when it being knowledged else where, is certified into the Court, and received to be there ingrossed and recorded. There are two sorts of Fines, the one at common law, the other levyed and proclaymed according to the statute. Two severall statutes are chiefly to be considered in fine levyed, and proclaymed according to the forme of a statute, the one of them is the statute of

1. R. 3. cap. 7. 4. H. 7. cap. 24. 32. H. 8. cap. 36.

1. R. 3. chap. 7. The other is the ſtatute of 4. H. 7. chap. 24. being in ſome thing afterwards explained by a ſtatute made in Anno 32. H. 8. chap. 36. the number of theſe proclamations are foure: and to be made at foure ſeverall termes, and a fine levyed, and proclaimed, in the Kings Majeſties Court, before his Juſtices of the common Pleas: of any lands, or hereditaments is ordeyned to be a finall end, and to conclude as well privies as ſtrangers to the ſame, except ſuch ſtrangers as are women, Covert perſons then being within age viz. the age of 21. yeares, in perſon, or out of this Realme, or not of whole minde, at the time of ſuch fine levyed. But this exception is conditionall, viz. that they or their heires, inheritable to the ſame lands &c. doe take their action or lawfull entry according to their right and title, within five yeares next after they be of full age of 21. yeares, out of priſon, uncovert, within this Realme, and of whole mind, and the ſame actions ſue, or their lawfull entries take and purſue according to the law. Concerning fines with proclamations, five things are to be obſerved.

First

First the time of levying and proclaiming the same. Secondly the place where, and before whom it is to be levyed. Thirdly of what things it be levyed. Fourthly what ceremonies are therein to be observed. Fifthly the several times are to be observed and considered; First that the fine be levyed after the feast of Easter, which was in the yeare of Lord God, 1496. For all fines levyed before that time are out of the compasse of this statute 4. *H.* 7. As by the letter of the same statute it appeareth; 2. that the proclamation must be made in time of the terme; and therefore if any of those proclamations doe happen to be made either before the beginning or after the end of any terme, or on a Sunday, or other Festivall day exempted from the terme, as on the feast day on of the *Purification* of *St. Mary* the Virgin, *Ascension day*, *all Saints*, *All Souls* or on the feast day, of St. *John Baptist*, if it happen on any other day then on the Friday next after *Trinity Sunday* and to be recorded accordingly, then if it be not holpen by the statute 23. *Eliz.* cap. 3. All the proclamations are reversable, by a writ of error, or by Plea, as it

5 things are to be observed concerning fines with proclamations.

4. H. 7.

23. Eliz. cap. 3.

Plow. Com. 266. 267. it appeareth in *Finches* case *Plow: com.* 266. 267. and then the fine will be of no other natur or force, then a fine without proclamations And although in truth, the procalmations were all made within the termes, according to the forme of the statute, yet if the record or records, doe purport the contrary, they are reversable by error, or avoydable by Plea, if it be not holpen by the said statute; for a record is of that credit in law, that no averment may be admitted to the contrary.

It is to be considered who are privies, and who are strangers to a fine; according to the statute, there are three privities only. 1. privity in bloud only. 2. privity in estate (*tantum*) 3. privity in bloud and estate. There are three kindes of privities. 1. in bloud *tantum*. 1. One is when a man is heire to to his late Ancestor, and yet hath nothing by discent from him. As for example, if a father seised of lands in fee, doth thereof infeoffe a stranger and his heires, or if he by his last will and Testament in writing did dispose the same, being holden in Soccage to another in Fee, and hath issue and dyeth, in such

ſuch caſe, ſuch iſſue is privy in bloud, having nothing by diſcent. 2. One other kinde of privity in bloud is, when ſomething is deſcended unto him, as heire unto his Anceſtor and yet he claymeth the ſame by ſome other right, and not as heire, to ſuch Anceſtor. As for example, if there be a father and ſonne, and the ſonne purchaſeth lands of a ſtranger in fee, and is thereof diſſeiſſed by his father, who dieth thereof ſeiſed, and the ſame deſcend to his ſonne as heire, in this caſe the ſonne is privy alſo in blood, but not in eſtate; for although the poſſeſſion of the ſame land came to him by diſcent as heir to his father, yet he was therein remitted forthwith to his former eſtate. 3. And a third kinde of privity in blood *tantum*, is where a man in ſome reſpect is privy in blood and eſtate, and in another reſpect privy in blood *tantum*. As for example, if there bee two brothers, and the eldeſt purchaſeth lands in Fee, and is thereof diſſeiſed by his younger brother, afterwards diſſeiſed by a ſtranger, and that ſtranger dyeth thereof ſeiſed, the younger brother being within age, and afterwards the elder brother

dyeth

dyeth without iſſue, the younger ſon hath two manner of rights to the land the one is a right of Entry againſt his heire as is in by deſcent during his minority; but that right is onely in reſpect of his former poſſeſſion which he obtained by diſſeiſin, and not as heire to his brother, and in this reſpect he is privy in blood to his eldeſt brother, but not privy in eſtate. The other right that is now in the younger brother, is onely a right in Action, and not a right of Entry, and this is in him as heire to his brother, whoſe entry was taken away by the ſaid diſcent, in reſpect of his right he is privy in blood and eſtate to his brother. Privity in eſtate *tantum*, is when a man claimeth an eſtate in land, as aſſignee to another; as if *A.* infeoffe *B.* in this caſe *B.* and his heires are privy in eſtate to *A.* Privity in blood and in eſtate are of two ſorts, whereof the one may properly be called a privity of blood and eſtate, the other is ſo called unproperly and in a borrowed ſence. That which is properly called a privity in blood and eſtate, is when both privities do accrew by diſcent, by or from one Anceſtor. The other is, when the one of them accrewes by

by one manner of title, and the other by title of another kinde; As for example: if there be a father and a sonne, and the father purchaseth lands, and dieth thereof seised, and the same doth descend to his sonne, hee is to his father in a proper sence privy in blood and estate; because both those privities do to him accrew, by one discent from one Ancestor.

It is to be noted, that such privyes as the statute meaneth, are after the inrolling *dele fine et proclamation* made according to the forme of the statute, absolutely barred without hope of recovery or restraine, by any claime; but such as are strangers are barred only conditionally, if they or their heirs doe not claime according to the forme of the statute, within the times therein prescribed. It is a rule in law, that no error in the fault of the Judge can be assigned to reverse a Judgement, unlesse it be so apparant, that it may be tried by view of the record, or by inspection of the person: for if it should, many grave Judgments would be overthrowne by corrupt tryalls, of false surmises to the subversion of Justice and maintenance

of

of vice. But if the Judge give judgment for the one party upon the matter appearing of record, whereas he ought to give Iudgment for the other party, this is reversable by error, because such a faulte of the Iudge through ignorance of the law is apparant by the view of the record. Also a fine levyed by a feme covert is not erroneous, & therefore it is not reversable by error, but avoydable by her. Also a fine levyed by a feme covert at the common law is avoydable by the entry of the husband; yet since a fine levyed at this day and proclamation according to the forme of the said statute of 4. *H.* 7. or 31. *Eliz.* Cannot be avoyded by the entry of the husband, or the commissor, as to the estate of inheritance, but only to the Franktenement during the coverture, and so long afterwards as he shal be tenant by the curtesy, if he had issue by his said wife, before the fine levyed. And in that case albeit the husband doe enter within five yeares or before proclamations had and made, the Feme and her heires are barred as privyes to the fine, the words of the said statute of 4 H. 7. be the fine to be a finall end, and conclude as well

privies

privies as ſtrangers, and yet all ſtrangers ſhall not be barred by ſuch fine, the Kinge is no ſuch ſtranger as is compriſed in the ſaid act; for if the law-makers had meant to conclude the King thereby of his right, then it is not to be doubted (his greatnes being ſuch as it could not be forgotten) but they would have made ſome proviſion for his claime, which thing they have not done, becauſe they never intended to conclude him; but others, being bodyes corporate of things that goe by way of ſucceſſion, are comprized in this word (ſtrangers) in the body of the act. And yet they are not conteyned in the letter of exception, or of any of the ſavings which doe ſave rights, to men and their heires, ſpeaking nothing of corporations or ſucceſſions, or of any thing in ſucceſſion.

There be two kindes of liveries; the one called a livery en *fait* which is a ceremony uſed in the execution of a Feeffment in Fee, or a leaſe for life, by delivery of the ring of the doore of the houſe, or a clod of the land conteined in the Feoffment, in the name of the houſe and other hereditaments therein

Livery twofold
1 *en fait*
2. in law

compriſed. The other is called a Livery in Law, or a livery within the view, with the like ceremony in other forme uſed in the execution of ſuch Feoffement, or Leaſe *pur vie*; but that is not alway made upon the land, but onely in the view thereof, that is to ſay, in a place where the parties doe ſee and behold the land; and the Feoffer ſo beholding the ſame ſaith to the Feoffee, I make livery to you of this land according to the purport of the Deed (if it be a Feoffement by Deed) if it be without Deed, then the words are to this effect (*viz.*) I doe deliver to you ſeiſin of this land; or, if I doe make livery and ſeiſin of this land to you and your heires, or if it be for terme of life, to you for terme of your life. This being done, the Feoffee or Leaſſee, muſt enter, and before ſuch entry the livery within the view is not compleate; for if the Feoffer happen to dye before an entry made by the Feoffee, ſuch livery within the view is voyd, and cannot be good by any entry afterwards made.

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Conveyances and Assurances by Deede poll, or by Paroll.

A Conveyance or Assurance by Deede poll, is when it is made by a single Deed which is not indented, and albeit many Conveyances may be by Indenture, which could not be good by Law, if they were made by Deede poll, or by Paroll; yet *è converso* all Conveyances and Assurances that may be sufficient by Deede poll, or by Paroll, may also without all question bee good by Indenture. Also what thing soever may be conveyed by paroll, may be also conveyed by Deede poll, but *è converso*, many things may be conveyed by Deed poll, which may not be conveyed by paroll. Therefore it seemeth fit now to consider what things in respect of their nature and kinde may be conveyed by Deed poll, and not by paroll; and as touching Hereditaments transitory, or things transitory, which doe passe properly, or arise by grant, not by Livery, Reversions, and Remain-

ders expectant, or dependant upon a particular estate in any Hereditaments whatsoever, may by apt conveyance, passe, or be created by Deed poll, but not by paroll: and hereupon ariseth the generall rule, that those things which do lie in grant, and not in livery, cannot passe by paroll, but by deede. But such things as doe lie in livery may passe without Deedes; Feoffements of Messuages, Lands, Houses, Mannors, or Rectories, and such like, are Good without Deed; and so are Leases for yeares thereof made; because the Freehold thereof will passe by Livery; otherwise it is of grants of Seignories in grosse Rents, Services, Commons, Advowsons, Waste, Liberties, Franchises, and such like, being transitory, or of such Remainders or Reversions as are aforesaid. It is to be noted, that Lands, Tenements, or Hereditaments, or any estate therein, or any estate in a thing issuing thereof, cannot be conveyed to the King without matter of Record, as by Fine or Recovery, Record, as by Deed inrolled, and therefore a Grant, or any other Conveyance of such thing by Deed, is not sufficient, unlesse the

same

ſame deed be inrolled. And if a Leaſe of Land be made for life to *I. S.* the remainder to *I. S.* in Fee taile, the remainder to the King in fee, this remainder to his Majeſty cannot be good, unleſſe the ſame be by deed inrolled: But a Deed poll thereof inrolled will be no leſſe ſufficient to this purpoſe than an Indenture inrolled. And to the enrolment therof, the King is tyed to no time certain, ſo that an enrolment thereof at any time during his Majeſties life will be good in Law; but if it be not inrolled in his life time, then nothing can thereby be in the King. And if the King grant the ſame to another before Inrolement, the grant is voyd, and cannot bee made good by the enrolement thereof afterwards.

There are two ſorts of conveyances by deed. The one doth enure by tranſmutation of poſſeſſion, transferring of a naked right. Conveyances by deed that doe enure by way of tranſmutation of poſſeſſion, are of divers ſorts; whereof ſome do enure by way of removing of a poſſeſſion, and creating of an eſtate; ſome by creating both of an eſtate and poſſeſſion; ſome by extinguiſhment, ſome by ſuſpenſion hereof; and ſome by remotion of the poſſeſſion, and drowning

of the estate. Conveyances by transmutation of a possession, that do enure by removing both of the estate and possession, are such whereby an estate and possession formerly setled in the one party, are removed to the other party. Conveyances that do enure by removing of a possession and creating of an estate, are such, whereby a possession formerly setled in one party, is removed to another by creation of a new estate other then such as was in the party from whom it was derived. A conveyance that doth enure by creation of an estate and possession, is when the thing conveyed had no being before the making of such conveyance. A conveyance by transferring of a possession, is said to enure by way of extinguishment, when the thing and the estate conveyed are thereby extinguished. A conveyance doth enure by remotion of the possession, and a drowning of the estate. When a surrender is made of a particular estate for life, or for yeares to him that hath the Reversion or Remainder thereof, in which case the possession of the land is removed, but the estate is drowned; for he to whom the surrender is made

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is not ſeiſed of the particular eſtate, but of ſuch eſtate wherein the ſame is drowned; and ſuch ſurrender, of an eſtate which might have beene created without deede, or matter of record, may be ſurrendred by paroll.

Note that a ſurrender to any perſon of a particular eſtate which could not be created without deede, matter of record cannot be good by Paroll.

Conveyances by will.

A Conveyance by will is commonly called a deviſe, the party that giveth or bequeathes a thing by will is commonly called the deviſor, and he to whom it is bequeathed the deviſee; of deviſes generall there be three ſorts, 1. a deviſe by the common law, 2. a deviſe by cuſtome 3. by force of the ſtatutes of 32. and 34. *H.* 8. By the common law no manner of hereditaments, wherein the Teſtator had any greater eſtate then for yeares (except an eſtate in a uſe of lands or Tenements) was deviſable by will, but he that had ſuch uſe in Fee, or for another mans life, might before the ſtatute. 27. H. 8. *de uſibus in poſſeſſionem*

nem transferendis, have deviſed the ſame by will as he might doe of a terme in uſe. For the better diſcerning what deviſe is good by the common law, and what not: ſix things are meet to be obſerved. 1. That the deviſor be a perſon able to deviſe. 2. that the deviſee be capable of the thing deviſed, 3. That the things are deviſable by law, 4. That the purport thereof being no other in effect, then ſuch as might ſtand good in law, in a conveyance by act executed in the life of the deviſor, 5. That the deviſe be not impoſſible, 6. that it be certaine.

Concerning the firſt of theſe forasmuch as every will doth take effect by the death of the Teſtator, therefore without the death of ſuch Teſtator there can be no will, and without a will there can be no deviſe, and conſequently all kinde of corporations are unable to deviſe any thing by will, becauſe they never dye. A Maior and commonalty, Provoſt & fellowes of a colledge, Wardens and commonalty of a company, cannot deviſe any thing by will; no more can a Biſhop, Deane, Parſon, or Vicar, deviſe any thing deviſable, which they have

have not in their politique capacity, (viz) which he hath in right of his Bishoprick, Deanry, Parsonage, or Vicarage, but every of them may devise such thinges devisable as they have in their naturall capacity; for in respect thereof every of them must dye, but there are some naturall persons which have no power nor ability in law to devise any thing by wil; as persons not of whole minde and Ideots; But an infant of 14. yeares of age may make a will, and thereby make an executor of his goods. The husband may devise goods or chattells to the wife, albeit they are one person in law; A woman covert hath no power to give any goods by will, for without the consent of her husband, she cannot by law make a will, either of any of her husbands goods, or of such chattles in possession, or in right of action, as are in her husband in his right, or her selfe in her right. 12. *H.* 7 *Fol.* 24. A man outlawed in a personall action, or a person attainted of felony or treason, cannot devise any chattells personall, or reall, for if it were devisable or grantable, the property thereof is in the King, as aforesaid,

ſaid by ſuch outlary or Attainder.

Concerning the ſecond thing to be obſerved, not only perſons of full age, women ſole, and perſons of diſcretion and whole minde, but alſo infants ſeme, coverts, Ideot, and mad men are capable of a deviſe, becauſe it tendeth to their benefit, and not to their prejudice; but yet ſuch capacity of a woman covert is ſubject to a condition in law (viz.) if her husband doe not diſagree to the ſame; for if at any time during the coverture he doth diſagree thereunto, the deviſe is void in law, unles before ſuch diſagreement he did formerly agree to the ſame; but if he doe once agree to it, his diſagreement afterwards is of no effect. Alſo perſons outlawed in a perſonall action, or convict or attainted of fellony or treaſon, are capable of a deviſe; but in ſuch caſe, if the deviſe be of a chattell, the King ſhall have the thing deviſed, as a chattell forfeited by the outlawry, conviction, or attainder; and if the deviſe be of an eſtate in Free-hold, or Inheritance in lands or Tenements, then in ſome caſe the King, and in ſome caſe the Lord, of whom the ſame is holden, as the caſe may require, ſhall be

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intitled thereunto; Also a devise made to a childe in his mothers womb is good in law.

Of the third observation, for the better discovering what thing is devisable by the common law, and what not, a difference is to be observed, betwixt an estate to the use of another created by law; and an estate made or conveyed to the use of another by agreement of parties; for where it is created by law to the use of another, there it is not devisable by will; but if it be made or conveyed by agreement, it is other wise; as for example; If a man seised in Fee of lands holden in soccage, hath issue a sonne and dyeth, the sonne being under 14. yeares of age, in this case the law appointeth the care and custody of such issue, and of the same lands, which came to him by discent from his father, unto his mother (if she be living) as Guardian in soccage, untill he be of the age of discretion viz. 14. yeares; but this wardship in soccage, to to her accrewing by by law, is to the only use and profit of the Infant, and therefore it cannot be devisable by will, neither shall it goe to the Executor or administrator of the

mother

mother after her death, but to the next Anceſtor of the Infant of the mothers ſide, as it appeareth, *Plowden* fol. 239. and 294. in the caſe between *Osborne* and *Joye*.

Concerning the fourth if *caſtiq;* uſe in Fee of Land before the ſaid Statute of 27 *H.* 8. had deviſed the ſame to *I. S.* and his heires, and for default of ſuch heires to remaine to *I. D.* or if hee had deviſed the ſame to *I. S.* and his heires, untill *I. N.* doe happen to die without iſſue of his body, the remainder to *I. D.* and his heires, this deviſe of ſuch Remainder had been voyd; becauſe by the rules of Law, a Remainder could not be limitted to depend upon an eſtate in Fee ſimple, ſo that ſuch a Remainder could not have been created by conveyance executed in a mans life.

Concerning the fifth obſervation; if a man be poſſeſſed of a terme determinable by his death, doth deviſe the ſame by will to another, the deviſe is voyd, becauſe it is unpoſſible that it ſhould take any effect. Alſo a deviſe to *I.* the ſonne of *T. S.* of *D.* whereas the ſame of *T. S.* hath onely iſſue *W.* is voyd, becauſe there is no ſuch perſon *in rerum natura*.

ſo

So it is alſo, if a terme be deviſed to the Executors of *I. D.* whereas *I. D.* died Inteſtate.

Concerning the ſixt obſervation, if any having iſſue many children, doth by Will give or bequeath a cup of ſilver, a horſe, or any other thing deviſable, to one of his ſonnes; this deviſe is voyd, becauſe it is uncertaine which of his ſonnes ſhould have it; ſo it is alſo, if the like deviſe be made diſ-junctively to *I. S.* or *I. D.* but a deviſe to one of his ſonnes, at the choice of his Executors, is good, becauſe the uncertainety may be reduced to a certainety by the election of the Executors. So alſo if a man be poſſeſſed of a terme in lands for 60. years, and by his Will deviſe to *I. D.* ſuch and ſo many years of his ſaid terme, as ſhall be nominated or appointed by his Executors, this deviſe is good, *cauſa quaſtio*; and yet a gift or grant thereof in that form made by conveyance, executed in his life, could not be good, the reaſon thereof is, becauſe he can have no Executors in his lifetime, by reaſon whereof it is impoſſible to reduce ſuch Gift or Grant unto a certainety before his death; and a conveyance executed

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in a mans life must be reduced to a certainty before his death, or else it can be of no effect in Law. But that reason ceased in a devise (which taketh no effect untill his death) and therefore the Law is therein differing accordingly. Also it is to be observed, that a devise of Chattels may be good, either by will nuncupative, or by writing.

Concerning a use, it is to bee observed, that a man seised of Lands or Tenements in Fee, to the use of him and his heires, could not by the common Law devise the use thereof by Will, unlesse the same Lands or Tenements were devisable by custome. But if *I. S.* seised of certaine Lands in Fee, had infeoffed certaine persons thereof to the use of himselfe and his heires, this use so severed from the possession, was devisable by the Common Law, albeit the Lands out of which it riseth were not devisable.

Conveyances by Will of Lands devisable by Custome.

IT is to be noted, that albeit by the rule of the Common Law no Hereditaments

ditaments (other then a Uſe) was deviſable by Will; yet by particular Cuſtomes in divers Cities, Burroughs, Lands and Tenements therein ſcituate have alwaies been deviſable by Teſtament, ſo that the cuſtome doth therein alter courſe of the Common Law. But in every ſuch deviſe, ſix things are eſpecially to be obſerved.

1. That the thing deviſed bee comprized within the Cuſtome.

2. That the deviſe be purſuant to the cuſtome.

3. That the power of the Deviſor be not reſtrained by Statute.

4. That the Cuſtome be lawfull and reaſonable.

5. That the intent of the Deviſor be certaine, lawfull, and not unpoſſible.

6. That the Will bee not countermanded.

Concerning the firſt of theſe, the obſervation is double.

1. That the thing deviſed be as well in nature and kinde, as alſo in continuance, ſuch as is warranted by the cuſtome.

2. That it be contained within the bounds

bounds and limits thereof. As to the first part, if by custome all the tenements within a certaine City or Burrough bee deviſable by Will; A rent charge, and rent ſeck which had continuance time out of minde, are in nature, kinde, and continuance, ſuch as bee compriſed within the cuſtome, and therefore are by force of ſuch cuſtome deviſable. As to the ſecond part of the obſervation; If a man ſeiſed of rent in fee, which time out of memory hath had a continuance, the ſame rent is iſſuing as well out of lands within the limits of ſuch cuſtome, as aforeſaid, as alſo out of Lands not contained within the precincts, this Rent is not deviſable by the ſaid Cuſtome, becauſe the ſame or any part thereof is not contained within the precincts thereof, which muſt bee taken ſtrictly.

The ſecond obſervation hath three branches, one concerning the perſon deviſing, another touching the perſons to whom the deviſe is made; And the third granteth the deviſe it ſelf.

1. As to the firſt braneh, a deviſe made by a Forraigner, to any perſon of lands or tenements ſcituate within the City of London

London, to the Cuſtome of *London*, as appeareth *M.* 8. & 9. *Eliz.* fol. 255. But yet ſome perſons compriſed within the generall cuſtome are by the rule of the common Law exempt from the ſame, as a deviſe made by a perſon lunatique, an Ideot, an Infant, and a man ſeiſed onely in the right of his wife, is voyd, this cuſtome notwithſtanding.

As to the ſecond branch; Citizens and Freemen of *London* may by the cuſtome of the ſaid City, without the Kings licenſe, lawfully deviſe lands in *London*, whereof they are ſeiſed in Fee, to Guilds or Corporations, as appeareth by 5. *H.* 7. 10. 19. But if hee bee only a Freeman, and no Citizen, or only Citizen and no Freeman, hee cannot without the Kings ſpeciall licenſe lawfully deviſe in *Mortmaine*.

As to the third branch; if the cuſtome be, that lands and tenements within a certaine Citie be deviſable in Fee taile for ſuch eſtate, *Weſt.* 2. was a Fee ſimple; alſo it ſeemeth probable, that by force of a cuſtome, that maketh lands and tenements deviſable, a man may deviſe thoſe things that are therein growing

ing as trees, graſſe, and ſuch like. But if a deviſe of a rent, or common out of lands deviſable, is not purſuant to the cuſtom, becauſe they had no being at the time of the deviſe, and though they had any beginning, yet they were created within the time of memory, they are not deviſable for the cauſe aforeſaid. If a houſe be onely erected upon deviſable lands by cuſtome, a deviſe thereof is purſuant to the cuſtome; albeit in that place there was never any houſe before, becauſe the houſe doth receive the nature of the land, whereupon it was built as a principall part, whereof it doth conſiſt, the change of the name notwithſtanding.

Concerning the third obſervation; it is to be noted, that albeit the cuſtome hath beene to deviſe lands to any perſon or body politique, yet the ſame may not by force of ſuch cuſtome be deviſed at this day in *mortmaine*, upon paine of forfeiture, according to divers ſtatutes, unleſſe the licence of the King, with the conſent of the Lords mediate and immediate, be firſt therin had and obtained; for ſuch cuſtome is in that behalfe qualified and reſtrained upon the

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paine aforeſaid by the ſtatutes of *mort-maine* (viz.) *Magna Charta*. A cuſtome that beganne onely ſince the ſtatute, cannot be good; for every cuſtome that may evidently appeare to have his beginning ſince the time of *R.* 1. is voyd in law, as appeareth by 33. *H.* 6. 27. 9. *H.* 6. *et. Littleton* 38. yet nevertheleſſe the cuſtomes to deviſe *mort-maine* are not abrogated by any of the ſaid ſtatutes; for the deviſe, or other forme of alienation in *mortmaine* is not by any of the ſaid ſtatutes made voyd, but it is only in advantage of the the Lords, who might ſuſteine loſſe thereby, prohibited upon paine of ſuch forfeiture to them accrewing, as thereby appeareth; ſo that by licence & conſent as aforeſaid, a deviſe in *mortmaine* by force of a cuſtome may ſtand good in law, without danger of the penalty of forfeiture.

Concerning the fourth obſervation; if the cuſtome be not lawfull and reaſonable it is voyde; ſo that a deviſe by vertue thereof cannot be of any force in law. And therefore if an alien doe purchaſe and deviſe lands lying within a certain Borough by force of a cuſtome

that lands and tenements within the ſame Borrough are deviſable to aliens in Fee to their owne uſe, and by them deviſable by teſtament, this deviſe is void, for ſuch cuſtome againſt the Kings prerogative is unlawfull; albeit his highneſſe cannot be thereunto entitled without office or other matter of Record, yet meane betweene ſuch purchaſe and office found &c. I take the Alien to be pernour of the profits, and that the eſtate purchaſed is forthwith in conſideration of the ſame lands, untill the kings title doe appeare by office or other matter of record. Alſo it is to be obſerved, that a cuſtome to deviſe a Right, ſeparated, from the poſſeſſion, cannot be lawfull, becauſe it ſavoureth of maintenance. As touching unreaſonable cuſtomes, if the cuſtome within any Citty or Burrough be, that Tenements therein ſituate are deviſable by Infants, Ideots, or mad men, is unreaſonable, and therefore void. But a cuſtome that the ſame be deviſable by children of 14. years is good.

Concerning the fifth obſervation, the intent of the deviſor be uncertain,

unlawfull.

unlawfull, or impossible, the deuise will be of no force in law. The intent of deuisor may be uncertaine, either in the person to whom he doth deuise, or in the thing deuised, or in the estate that should passe thereby. And first concerning the person it appeareth 49. E. 3. 3. one *Iorden* did deuise certain Tenements in *London* to one for life, so that after his decease the same should remaine unto 2. of the better sort of the fraternity of *London*, this remainder was agreed to be void for want of certaintie, which persons of the fraternity should have the same. Secondly, as concerning the certainty in the thing deuised; as for example; if a man seised of lands or tenements deuisable; doth by will bequeath a portion therof to *I.S.* this deuise is void because it doth not appeare, what or how great a portion thereof the deuisee should have by force of the said will. 3. Albeit the intent of the deuisor doth certainly appeare, and the persons to whom the deuise is made, and in the lands and tenements deuised, yet if the estate therein limitted be so uncairten, that neither by matter expressed or implyed in the

will, nor by a common Intendement it cannot be reduced into a certainty, the deviſe will be void in law. And therefore if a man ſeiſed of lands deviſable as well by will nuncupative as by writing, doth by will in writing amongſt other things bequeath the ſame to I. S. for ſuch eſtate as is ſpecified in a ſchedule thereunto annexed, and then the deviſor dyeth without annexing any ſchedule to the ſaid will, or other declaration of the certainty of the ſtate, this deviſe is void in law. Now it is be conſidered, that albeit the intent of the deviſor be certaine in all things, that nevertheleſſe though it be unlawfull, the ſame will be no force. And therefore it is alſo needfull to diſcerne, where and in what caſe the intent of the deviſor is unlawfull, and where not; and the intent of the deviſor is unlawfull, when it is ſo repugnant to the rules of the law, as that by any counſel learned in the law, it could take no effect by conveyance executed in his life time; as for example, a deviſe of a naked right, or poſſibility of a remainder to depend upon an eſtate in the ſimple thereby bequeathed, is ſaid to be unlawfull; for as no ſuch remainder

mainder could be bequeathed, *id est* conveyed by any act executed in a mans life. So also no bare right could be conveyed by the like act executed in his life to any person, other then such as were seised, or to be seised of the free hold of the same lands at the instant of the execution of the conveyance, and that only by way of the extinguishment. And hereupon it followeth, that a man having right to lands devisable, being by defeisable title in the possession of *I. S.* cannot devise the same by will to *I. D.* So also the Lord, of whom the lands devisable are imediately holden by Knights service, cannot devise his possibility of Escheates or wardship, that may thereof accrew to him, when his Tenant shall happen to die without heires, or the possibility of wards, when the heires shall be within age.

Concerning an intent impossible, wee terme that an impossible intent, which by no probable and common possibility can be accomplished; and of such impossible intents, there are 2. sorts. 1, Impossible both at the time of the making of the will, and also at the death of the devisor. 2, Impossible only at

at the time of the deviſe, and not at the time of the deceaſe of the teſtator. 3. Impoſſible at the time of the making of the deviſe. And as to firſt ſort of lands deviſable by will, bequeathed to the heires of S. who was attainted of felony or treaſon, unreverſed at the time of the deviſe, or death of the deviſor: or if in time of Romiſh religion, ſuch deviſe was made to one that was a Monk, being not deraigned at the time of the deviſe, or death of the teſtator; or if the ſame be deviſed to the heires of I. *D.* who was then dead without heire; or to a corporation that had noe being at the time of the will, or death of the teſtator; Or if a man by his will doe deviſe a certain houſe in a Borrough, wherein at the time of his deviſe and death, he had nothing: Or if lands be deviſed to the executors of I.S. who died inteſtate, in every of theſe caſes, the intent of the deviſor was impoſſible, both at the time of the deviſe and death of the deviſor; and for ſuch impoſſibility, the deviſes are abſolutely voide.

Concerning the 2. ſort; if lands were deviſed to a Monk, who at the time

time of the death of the teſtator was deſigned, or to the heirs of one is that attainted of &c. which is afterwards reverſed before his death, or to a Corporation that hath a being at the time of his death, but not created at the time of the deviſe, in theſe caſes, the intent of the deviſor, was onely impoſſible at the time of the deviſe, but not at the time of the deceaſe of the teſtator. And yet I take the Law, that thoſe deviſes be alſo voyd, *nam quod ab initio non valet id tractu temporis non convaleſcit.*

The ſixt obſervation is, that the deviſe be not countermanded; for it is a cleere caſe, that it is countermandable at the pleaſure of the Deviſor, or thereby the deviſe will bee of no force in Law. And it is to be noted, that there are two kindes of Countermands, the one is a countermand in deed, the other a countermand in Law. A countermand in deed, is when a Teſtator doth expreſly revoke his Will formerly made, or any part thereof; and this countermand by word is of no leſſe force then if it were by writing; for albeit the Will containe, amongſt other things deviſes of Lands, bee it in writing as an effectuall part thereof

thereof, in case where the custome or law doth so require it; yet nevertheless an expresse countermand by word of the will, or of any devise of lands therein comprised, will be sufficient in Law to controle the same, as it appeareth by *Reits* case, 14 *El.* Also, if after the making of the Wil, the Testator doth cause a devise therein made to one man to be quite stricken out; this is also a countermand in deed of that devise, and the will standeth good for all the residue. A countermand which in Law is that which neither by word nor deede is expressed, but onely in those other acts implyed. As for example, the making of another will doth imply a revocation of the former, and therefore it is a countermand in Law thereof. So likewise if lands be devised by will, and afterwards the devisor infeoffeth a stranger in Fee thereof, this Feoffement doth imply a revocation of the devise of the land, and therefore it is in that part a countermand in Law, albeit he afterwards repurchase the same. 44 *Ed.* 3. 33. And although lands devisable by a custome may be executed by a Writ of *ex gra. querela*, yet if there be no speciall custome to the contrary, the

heirs

deviſee may (if he pleaſe) execute the ſame by Entry as it appeareth by 35 *Aſſ. plit.* 12. 40. *Aſſ. p.* 2. 27. *Aſſ. p.* 60 And in every ſuch caſe the poſſeſſion in Law of the thing deviſed is immediately after the deceaſe of the Teſtator no leſſe caſt upon the Deviſee, then it ſhould have been caſt upon the heire, if no deviſe had been thereof made, as appeareth *Brookes title deviſe*, 490.

Conveyances by Will, by force of the Statute of 32 & 34. *H.* 8.

ALthough Lands and Tenements, wherein a man had any greater eſtate than for years, were not deviſable by the Common Law; yet untill the making of the Statute 27 H. 8. cap. 10. *de uſubus in poſſeſſionem transferendis*, men did commonly put their lands in uſe; (*viz.*) they did enfeoffe others in Fee, to the uſe of themſelves & their heirs, to the end that they might deviſe the ſame uſe, and by force thereof after the deceaſe of the Teſtator, the Feoffees did at the requeſt of ſuch deviſee, make and execute to them an eſtate in the land according

to

to the use devised, and if the Feoffees did refuse so to doe, the devisee might thereunto compell him by suite in the Chancery. And so by such subtill invention the devisee obteined the effect of a devise of the same Lands or Tenements which were not then devisable by Law.

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